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ASSESSING CONSENSUS: THE PROMISE AND PERFORMANCE OF NEGOTIATED RULEMAKING

CARY COGLIANESE[†]

Negotiated rulemaking appears by most accounts to have come of age. A procedure that once seemed confined to discussion among administrative law scholars has in the past decade captured the attention of policymakers throughout the nation's capital. Congress officially endorsed regulatory negotiation in the Negotiated Rulemaking Act of 1990,¹ and it permanently reauthorized the Act in 1996.² Over the past few years, the executive branch has visibly supported regulatory negotiation, both through the Clinton administration's National Performance Review (NPR)³ and

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1. 5 U.S.C. §§ 561–570 (1994 & Supp. I 1995).

2. See Administrative Dispute Resolution Act of 1996, Pub. L. No. 104–320, § 11(a), 110 Stat. 3870, 3873.

3. See OFFICE OF THE VICE PRESIDENT, ACCOMPANYING REPORT OF THE NATION-

through specific presidential directives to agency heads.⁴ Congress has also begun to mandate the use of negotiated rulemaking by certain agencies in the development of specific regulations.⁵ As a result of these and other efforts, federal agencies have begun to employ the consensus-based process known as negotiated rulemaking.⁶

Negotiated rulemaking supplements the notice-and-comment procedures of the Administrative Procedure Act (APA)⁷ with a negotiation process that takes place before an agency issues a proposed regulation. The agency establishes a committee comprised of

AL PERFORMANCE REVIEW: IMPROVING REGULATORY SYSTEMS 32 (1993) [hereinafter IMPROVING REGULATORY SYSTEMS].

4. See Exec. Order No. 12,866, 3 C.F.R. 638, 642-43 (1994), *reprinted in* 5 U.S.C. § 601 (1994); Memorandum for Executive Departments and Selected Agencies [and the] Administrator of the Office of Information and Regulatory Affairs, 58 Fed. Reg. 52,391 (1993) [hereinafter President's Negotiated Rulemaking Memorandum].

5. Some recent bills introduced in Congress would require specific agencies to use negotiated rulemaking in developing regulations. See, e.g., Intermodal Transportation Safety Act of 1997, S. 1267, 105th Cong. § 521 (requiring the establishment of a motor vehicle safety advisory committee to assist in negotiated rulemaking); Tribal Self-Governance Amendments of 1997, H.R. 1833, 105th Cong. § 517 (requiring negotiated rulemaking with Indian Tribes); Public Housing Reform and Responsibility Act of 1997, S. 462, 105th Cong. §§ 106(b)(2), 110(b)(1), 208 (requiring use of negotiated rulemaking to implement various legislative provisions). For a list of statutes requiring the use of negotiated rulemaking, see *infra* note 75. One of the more salient legislative debates over a mandate for negotiated rulemaking occurred in June of 1995 when Congress turned its attention to new meat safety standards to be issued by the Department of Agriculture. Secretary of Agriculture Dan Glickman successfully resisted congressional efforts to compel the use of a formal negotiated rulemaking process for these regulations, agreeing instead to hold a series of informal meetings with affected parties. See *Accord is Reached on Meat Safety Issue*, N.Y. TIMES, July 20, 1995, at B11; *Compromise Reached on USDA's HACCP Rule: Walsh to Withdraw Amendment*, BNA WASH. INSIDER, July 20, 1995, at D10.

6. Negotiated rulemaking is defined by statute to mean "rulemaking through the use of a negotiated rulemaking committee[.]" and such a committee is in turn defined as "an advisory committee established by an agency . . . to consider and discuss issues for the purpose of reaching a consensus in the development of a proposed rule." 5 U.S.C. § 562 (1994 & Supp. I 1995). In this Article, I sometimes use the term "negotiated rulemaking" interchangeably with "regulatory negotiation" (reg neg), even though regulatory negotiation actually connotes a broader range of methods used by agencies for soliciting public input. Such other methods can include public hearings, one-time workshops, occasional roundtables, and established advisory committees. What distinguishes these forms of public participation from the formal negotiated rulemaking process is the explicit quest in negotiated rulemaking for "reaching a consensus [among the participants] in the development of a proposed rule." *Id.* Thus, in seeking to assess consensus, as the title of this Article suggests, I am focusing only on the most extreme form of public participation, which seeks to achieve not merely the input and support of outside parties, but the achievement of a consensus among them.

7. 5 U.S.C. § 551 (1994 & Supp. I 1995).

representatives from regulated firms, trade associations, citizen groups, and other affected organizations, as well as members of the agency staff.⁸ The committee meets publicly to negotiate a proposed rule.⁹ If the committee reaches consensus,¹⁰ the agency typically adopts the consensus rule as its proposed rule and then proceeds according to the notice-and-comment procedures specified in the APA.¹¹ Proponents of negotiated rulemaking claim that these procedures—which encourage affected parties to reach an agreement at the outset—will decrease the amount of time it takes to develop regulations¹² and, more notably, reduce or eliminate subsequent judicial challenges.¹³

Does negotiated rulemaking achieve its instrumental goals for federal agencies, such as those of saving time and reducing litigation? Many seem convinced that it does. In legislative hearings leading up to the Negotiated Rulemaking Act of 1990, Senator

8. See 5 U.S.C. §§ 564–565 (1994).

9. Negotiated rulemaking committees must generally meet the applicable requirements for advisory committees, see *id.* § 565(a)(1), one of which is the Federal Advisory Committee Act's requirement that meetings be open to the public. See 5 U.S.C. app. § 10(a)(1) (Supp. I 1995).

10. By statute, "consensus" is defined as unanimous concurrence or any lesser concurrence if agreed to unanimously by the committee. See 5 U.S.C. § 562(2) (1994).

11. These procedures include publication of a notice of proposed rulemaking, an opportunity for the interested persons to comment on the rule, and a statement of the basis and purpose of the final rule. See *id.* § 553. For an overview of notice-and-comment rulemaking, see James V. DeLong, *Informal Rulemaking and the Integration of Law and Policy*, 65 VA. L. REV. 257 (1979).

12. See, e.g., Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 30 (1982) (asserting that negotiated rulemaking "can reduce the time and cost of developing regulations"); ADMINISTRATIVE CONFERENCE OF THE U.S., BUILDING CONSENSUS IN AGENCY RULEMAKING: IMPLEMENTING THE NEGOTIATED RULEMAKING ACT 1 (1995) [hereinafter ACUS, BUILDING CONSENSUS] ("reg-neg can improve the quality, acceptability and timeliness of regulations"); Conference, *Harvard Electricity Policy Group: Regulatory Decisionmaking Reform*, 8 ADMIN. L.J. 789, 875 (1995) (statement by Michael Asimow that "negotiated rulemaking is an exceptionally promising technique to speed up the rulemaking process and achieve consensus").

13. See, e.g., NATIONAL RESEARCH COUNCIL, UNDERSTANDING RISK: INFORMING DECISIONS IN A DEMOCRATIC SOCIETY 202 (Paul C. Stern & Harvey V. Fineberg eds., 1996) ("The purpose of regulatory negotiation is to reduce legal challenges to new rules by involving would-be adversaries directly in the rule-making process and by producing a draft rule that meets legal requirements and is acceptable to a wide array of interested and affected parties."); Patricia M. Wald, *Negotiation of Environmental Disputes: A New Role for the Courts?*, 10 COLUM. J. ENVTL. L. 1, 18 (1985) (noting that advocates of negotiated rulemaking claim this procedure will "soften the adversary posture that animates the current comment process and reduce the inevitability of legal challenges to adopted rules"). See also *infra* notes 29–31, 39–57, 60–61, 87 and accompanying text.

Carl Levin remarked that while in the initial years "there was little evidence that [the] potential benefits of negotiated rulemaking would actually accrue," negotiated rulemaking now has "a track record of success."¹⁴ The NPR staff more recently urged others to follow the lead of those "federal agencies [that] have successfully pioneered a consensus-based approach to drafting regulations."¹⁵ The authors of the NPR report concluded that at least at the Environmental Protection Agency (EPA) "regulatory negotiations, on average, take less time than other rulemakings" and have resulted in a significant decline in the rate of judicial challenges.¹⁶

Such claims notwithstanding, the instrumental value of negotiated rulemaking has more often been asserted than demonstrated. The reported literature on negotiated rulemaking consists largely of descriptive case studies (sometimes authored by participants themselves) and of prescriptive accounts espousing the theoretical advantages of negotiated rulemaking.¹⁷ Yet as the author of a

14. *Negotiated Rulemaking Act of 1987: Hearing on H.R. 3052 Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary*, 100th Cong. 31 (1988) [hereinafter *Hearing on H.R. 3052*] (statement of Sen. Carl Levin). Senator Levin has long supported negotiated rulemaking, sponsoring among the earliest pieces of legislation to support the process, the Regulatory Negotiation Act of 1980, S. 3126, 96th Cong., 126 CONG. REC. 26,074-76 (1980), as well as the most recent, the Administrative Dispute Resolution Act of 1995, S. 1224, 104th Cong., 141 CONG. REC. S12,961 (daily ed. Sept. 8, 1995).

15. IMPROVING REGULATORY SYSTEMS, *supra* note 3, at 29.

16. *Id.* at 31. The promise of negotiated rulemaking has led one administrative law scholar to embrace the procedure as "the policymaking idea of the 21st Century." Conference, *supra* note 12, at 875 (statement of Michael Asimow).

17. See, e.g., Neil Eisner, *Regulatory Negotiation: A Real World Experience*, 31 FED. B. NEWS & J. 371 (1984) (prescriptive lessons based on Federal Aviation Administration flight and duty rulemaking); Henry H. Perritt, Jr., *Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States*, 74 GEO. L.J. 1625 (1986) (conceptual framework based on negotiated rulemakings at the Occupational Safety and Health Administration, Federal Aviation Administration, and EPA); D. Michael Rappoport & John F. Cooney, *Visibility at the Grand Canyon: Regulatory Negotiations Under the Clean Air Act*, 24 ARIZ. ST. L.J. 627 (1992) (case study of EPA negotiated rulemaking); Ellen Siegler, *Regulatory Negotiations: A Practical Perspective*, 22 ENVTL. L. REP. (Envtl. L. Inst.) 10,647 (Oct. 1992) (prescriptive lessons drawing on author's experience in negotiated rulemaking); Lawrence Susskind & Gerard McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 YALE J. ON REG. 133 (1985) (examination of two EPA negotiated rulemakings). Barry Rabe has observed that most of what we know about the use of consensus-building techniques in the regulatory process has been produced by those individuals already strongly predisposed to its value. See Barry G. Rabe, *The Politics of Environmental Dispute Resolution*, 16 POL'Y STUD. J. 585, 591 (1988). The most detailed case study of the negotiated rulemaking process by an

leading text on rulemaking has observed, "[t]he purported superiority of consensual processes over decisionmaking techniques that employ methods outlined in the APA . . . cannot be established by mere positing of generalities and abstractions."¹⁸ Negotiated rulemaking has long lacked systematic evidence showing that it yields superior results over conventional rulemaking. Consequently, while both Congress and the President have been urging federal agencies to initiate more negotiated rulemakings, scholars have been acknowledging that the impact of regulatory negotiation remains an open empirical question.¹⁹ Even one of negotiated rulemaking's biggest institutional supporters, the now-defunct Administrative Conference of the United States (ACUS), noted in one of its final reports that "[t]here has been little formal evaluation of the use of negotiated rulemaking."²⁰

In an effort to fill this void, this Article presents an empirical assessment of the impact of negotiated rulemaking on two of its principal goals: reducing overall rulemaking time and decreasing the number of judicial challenges to agency rules.²¹ Unlike other

outside observer is Christine B. Harrington, *Howard Bellman: Using "Bundles of Input" to Negotiate an Environmental Dispute*, in DEBORAH M. KOLB ET AL., *WHEN TALK WORKS* 105 (1994) (detailing negotiation process in Nuclear Regulatory Commission rulemaking).

18. Cornelius M. Kerwin, *Assessing the Effects of Consensual Processes in Regulatory Programs: Methodological and Policy Issues*, 32 AM. U. L. REV. 401, 409 (1983). But see CORNELIUS M. KERWIN, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY* 190 (1994) (noting that "[n]egotiated rulemaking is now a mature concept with a considerable, and largely positive, track record in the development of rules").

19. See, e.g., Wolfgang Hoffman-Riem & Irene Lamb, *Negotiation and Mediation in the Public Sector—The German Experience*, PUB. ADMIN. 309, 325 (1994) (noting that the benefits of mediation in the public sector remain an "open issue"); Rosemary O'Leary, *Environmental Mediation: What Do We Know and How Do We Know It?*, in *MEDIATING ENVIRONMENTAL CONFLICTS: THEORY AND PRACTICE* 17, 32 (J. Walton Blackburn & Willa Marie Bruce eds., 1995) (observing that more research is needed on public negotiation and mediation); Susan Rose-Ackerman, *Consensus Versus Incentives: A Skeptical Look at Regulatory Negotiation*, 43 DUKE L.J. 1206, 1212 (1994) (suggesting that widespread benefits of negotiated rulemaking are largely speculative).

20. ACUS, *BUILDING CONSENSUS*, *supra* note 12, at 28. If negotiated rulemaking were costless, it might well be fine to forego the challenges inherent in conducting a systematic evaluation. But negotiated rulemaking does demand much time and effort on the part of federal agencies as well as nongovernmental actors. See *infra* notes 127–31, 317 and accompanying text. A systematic evaluation of the main goals of negotiated rulemaking can therefore help guide agency decisions about how to structure rulemaking proceedings. Such an evaluation is also consistent with the principles underlying the Government Performance and Results Act of 1993, Pub. L. 103–62, 107 Stat. 285 (codified in scattered sections of 5 U.S.C., 31 U.S.C., and 39 U.S.C.) (designed to promote the evaluation of the results of governmental programs).

21. By limiting my focus to these two primary goals, I do not necessarily endorse

research, my analysis considers the use of regulatory negotiation by all federal agencies over the past thirteen years. Like others, I too give special attention to rulemaking at the EPA because it has pursued by far the most negotiated rulemakings and it has been the focus of many of the claims about the purported success of the negotiated process.

In Part I, I review the development of negotiated rulemaking over the past decade and a half, giving close attention to the previously unexamined legislative history underlying the Negotiated Rulemaking Act of 1990. My review shows that the chief goals of negotiated rulemaking have been to reduce both rulemaking time and the filing of petitions for judicial review. In Part II, I report on the extent to which federal agencies have used negotiat-

them as the only measures for evaluating negotiated rulemaking or any other rulemaking process. There may well be other relevant instrumental goals, such as information exchange or increased compliance, however difficult they may be to measure. Moreover, notwithstanding the apparent litigation anxiety reflected in much of the literature on negotiated rulemaking, the fact that someone files a petition for review does not mean that the regulatory process was for that reason alone a failure nor even that the process was necessarily all that contentious. See Cary Coglianese, *Litigating Within Relationships: Disputes and Disturbance in the Regulatory Process*, 30 L. & SOC'Y REV. 735, 758-62 (1996) (explaining the compatibility of litigation with ongoing, cooperative relationships in the regulatory process). My purpose in this Article is simply to assess negotiated rulemaking on its own terms, using the standards that have been set for it by those legislators, agency officials, practitioners, and scholars who have advocated its use over the years. The goals of saving time and reducing litigation are by far the most prominent ones invoked in the literature and the legislative history. See *supra* notes 12-13 and *infra* notes 39-61, 82-86 and accompanying text. Of course, the extent to which negotiated rulemaking does or does not achieve its instrumental goals should be understood as relevant to but not dispositive of any assessment of negotiated rulemaking from the standpoint of democratic or constitutional theory. Even if negotiated rulemaking reduced time and litigation substantially, we still might reject it for reasons related to representation and governmental accountability. See, e.g., THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* (2d ed. 1979) (arguing against legislative delegation of policymaking authority); Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073 (1984) (arguing against decentralized decision-making in the litigation process); William Funk, *When Smoke Gets in Your Eyes: Reg-Neg and the Public Interest—EPA's Woodstove Standards*, 18 ENVTL. L. 55, 96-98 (1987) (arguing that regulatory negotiation tends to subvert the administrative search for the public interest); Christine B. Harrington, *Regulatory Reform: Creating Gaps and Making Markets*, 10 LAW & POL'Y 293 (1988) (arguing that negotiated rulemaking shifts relationships between the state and regulated interests). But see Philip J. Harter, *The Political Legitimacy and Judicial Review of Consensual Rules*, 32 AM. U. L. REV. 471, 489 (1983) (arguing that consensual rulemaking can enhance the legitimacy of regulation); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 99 (1985) (arguing that delegation of policymaking to administrative agencies can make government more responsive to the public).

ed rulemaking and the outcomes they have achieved in terms of the two main goals of timeliness and reduced litigation. My findings run counter to the prevailing consensus in favor of negotiated rulemaking and draw into question the continued value of formal negotiated rulemaking. Despite all the postulations about how negotiated rulemaking will save time and eliminate litigation, the procedure so far has not proven itself superior to the informal rulemaking that agencies ordinarily use. In Part III, I anticipate and respond to potential criticisms of my analysis and conclude that it is time to reassess the value of full-scale negotiated rulemaking in light of its surprisingly weak track record.

I. THE PROMISE OF NEGOTIATED RULEMAKING

Proponents have promised many benefits from negotiated rulemaking, but chief among them have been the procedure's ability to develop regulations more quickly and with less resulting litigation. In order to understand these principal goals of negotiated rulemaking, it is helpful to turn to the history leading up to the Negotiated Rulemaking Act of 1990 and subsequent initiatives to expand the use of regulatory negotiation.

The idea of involving affected parties in executive branch policymaking dates back at least to the New Deal,²² and the idea has returned with renewed vigor in the past twenty years. In the mid-1970s, Secretary of Labor John Dunlop proposed that the parties most affected by federal regulations should play a greater role in the development of those same regulations.²³ Dunlop

22. As early as 1919, the Federal Trade Commission employed a negotiated process first called "trade practice submittals" and later referred to as "trade practice conferences." See Charles H. Koch, Jr. & Beth Martin, *FTC Rulemaking Through Negotiation*, 61 N.C. L. REV. 275, 294 (1983). As part of the New Deal, the National Industrial Recovery Act (NIRA) delegated authority to the President to give legal force to codes adopted by industrial associations. See 15 U.S.C. § 703 (1933). Although the Supreme Court held that NIRA amounted to an unconstitutional delegation of legislative power, the Court did acknowledge that the statute arose from a perceived need to foster cooperation by "permitting [regulated industry] to initiate the adoption of codes." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935). The Fair Labor Standards Act of 1938 also provided for procedures similar to regulatory negotiation by requiring wage orders to be developed through committees composed of employer and employee representatives. See Pub. L. No. 75-718, §§ 5, 8, 52 Stat. 1060, 1062, 1064-65 (1938).

23. See John T. Dunlop, *The Limits of Legal Compulsion*, 27 LAB. L.J. 67 (1976) (urging agencies to engage in direct discussion with affected parties in developing regulations); see also John T. Dunlop, *The Negotiations Alternative in Dispute Resolution*, 29 VILL. L. REV. 1421 (1983-84) (arguing that negotiation promises important benefits for

chaired the opening meeting of the National Coal Policy Project in the late 1970s, one of the most prominent early experiments with negotiation over regulatory policy.²⁴ The National Coal Policy Project sought the consensus of environmental groups and industry on policies related to increased coal production, and achieved agreement on several hundred proposals.²⁵ Although most of these proposals were never ultimately enacted, the Project did serve as a model for negotiated rulemaking by demonstrating that consensus could be built across conflicting groups of interests.

Negotiated rulemaking was introduced more prominently in the early 1980s as a way of curing a "malaise" that some thought characterized federal rulemaking practice at the time.²⁶ This malaise was attributed to the time and expense of rulemaking, as well as the amount of conflict and litigation over agency rules. According to Philip Harter's 1982 report to ACUS on negotiated rulemaking, the process of negotiating rules could reduce conflict, improve the exchange of information, decrease the length and cost of rulemaking, and overall lead to more effective and legitimate regulations.²⁷ Proponents alleged that if used in appropriate cases, negotiated rulemaking "should eliminate major controversy during the period after publication of the notice, unlike the hybrid rulemaking process in which the notice is an invitation to fight."²⁸

One of the most cited reasons for using negotiation has been its potential to ward-off judicial review challenges.²⁹ Intuitively,

the settlement of regulatory and legal disputes).

24. For the most extensive study of the National Coal Policy Project, see generally ANDREW S. MCFARLAND, *COOPERATIVE PLURALISM: THE NATIONAL COAL POLICY EXPERIMENT* (1993).

25. See *id.* at 1.

26. See Harter, *supra* note 12, at 113 (arguing that negotiated rulemaking can help cure "[t]he malaise of administrative law"); Robert B. Reich, *Regulation by Confrontation or Negotiation?*, HARV. BUS. REV., May-June 1981, at 82 (asserting that public negotiation can reduce conflict and controversy in the regulatory process); Peter H. Schuck, *Litigation, Bargaining, and Regulation*, REGULATION, July-August 1979, at 26 (arguing that direct negotiation can offset the "chronic fractiousness" of U.S. policymaking).

27. See Harter, *supra* note 12, at 28-31.

28. *Id.* at 101.

29. See Cynthia Croce, *Negotiation Instead of Confrontation*, EPA J., Apr. 1985, at 23, 23; D.V. Feliciano, *Negotiating Regulations: Let's Negotiate, Not Litigate*, 10 CURRENT MUN. PROBS. 217, 222 (1983-84); Jeffrey S. Lubbers, *Better Regulations: The National Performance Review's Regulatory Reform Recommendations*, 43 DUKE L.J. 1165, 1171 (1994); William H. Miller, *Bypassing the Lawyers: "Regulatory Negotiation" Gets Test in Agencies*, INDUSTRY WEEK, June 23, 1986, at 20; David M. Pritzker, *Working Together for Better Regulations*, 5 NAT. RESOURCES & ENV'T 29, 51 (1990); Lawrence Susskind &

rules developed through a process that seeks the consensus of affected parties at the outset would seem less likely to generate subsequent conflict and litigation.³⁰ By seeking to resolve conflicts through a quest for a negotiated agreement, the agency in theory is supposed to save time during the rulemaking process as well as afterwards by avoiding litigation.³¹

In response to Philip Harter's report, ACUS recommended that agencies use the negotiated rulemaking process.³² In 1983, the Federal Aviation Administration (FAA) initiated the first formal negotiated rulemaking.³³ A few other agencies followed the FAA in experimenting with the alternative procedure, most prominently the EPA. Although these early attempts at negotiation were generally considered valuable experiences, by 1990 only five federal agencies had promulgated rules using negotiated rulemaking.³⁴ Even though the Federal Advisory Committee Act (FACA)³⁵ effectively authorized agencies to establish committees

Laura VanDam, *Squaring Off at the Table, Not in the Courts*, 89 TECH. REV. 36, 72 (1986); Lee M. Thomas, *The Successful Use of Regulatory Negotiation by EPA*, ADMIN. L. NEWS, Fall 1987, at 1, 3.

30. Sometimes the parties to the negotiation even explicitly agree not to file a legal challenge if the final rule is consistent with the consensus reached in the negotiations. See, e.g., AGREEMENT OF EPA NEGOTIATING COMMITTEE FOR NEW SOURCE PERFORMANCE STANDARD FOR RESIDENTIAL WOOD HEATERS ¶ 5 (1986), reprinted in ADMINISTRATIVE CONFERENCE OF THE U.S., NEGOTIATED RULEMAKING SOURCEBOOK 240 (David M. Pritzker & Deborah S. Dalton eds., 1995) [hereinafter 1995 SOURCEBOOK] ("Each party other than EPA agrees not to challenge the final rule in court if the final rule and its preamble are consistent with the recommended proposed rule.").

31. See, e.g., Harter, *supra* note 12, at 59 (arguing that regulatory negotiation can head off the "wrangling and disputes" that make "regulations take an enormously long time to become effective," and that it can "provide a forum for more direct reconciliation of [regulatory] disputes in a less time consuming fashion").

32. See Administrative Conference of the U.S., Recommendation No. 82-4, Procedures for Negotiating Proposed Regulations, 1 C.F.R. § 305.82-4, ¶ 1 (1993) [hereinafter ACUS Recommendation No. 82-4] reprinted in 1995 SOURCEBOOK, *supra* note 30, at 11; Administrative Conference of the U.S., Recommendation No. 85-5, Procedures for Negotiating Proposed Regulations, 1 C.F.R. § 305.85-5 (1993) [hereinafter ACUS Recommendation No. 85-5] reprinted in 1995 SOURCEBOOK, *supra* note 30, at 15.

33. See Flight Time, Duty Time, & Rest Requirements for Flight Crewmembers, 48 Fed. Reg. 21,339, 21,340 (1983).

34. The five agencies were the Department of Education, Department of Labor, Department of Transportation, Environmental Protection Agency, and Nuclear Regulatory Commission. Three other agencies—the Department of Agriculture, Department of Interior, and Federal Trade Commission—had initiated negotiated rulemaking proceedings but had yet to issue final rules following these negotiations.

35. 5 U.S.C. app. (1994).

to negotiate rules,³⁶ agencies were thought reluctant to proceed in the absence of clear congressional guidance specifically approving negotiated rulemaking committees.³⁷

As early as 1980, members of Congress began introducing legislation to encourage the use of negotiated rulemaking.³⁸ Even during these early years of Congressional consideration, advocates portrayed negotiated rulemaking as a means of reducing regulatory delays and avoiding judicial challenges. In joint congressional hearings on negotiated rulemaking in 1980, members of Congress singled out judicial challenges of federal regulations as a pressing problem. Senator Gaylord Nelson observed that federal regulations frequently ended up in court, prolonging the rulemaking process and increasing agency costs.³⁹ Several other participants in the hearings, including Senator Carl Levin,⁴⁰ EPA Deputy Assistant Administrator Roy Gamse,⁴¹ and industry representatives Harrison Loesch⁴² and M. Kendall Fleeoharty,⁴³ warned of the growing resort to judicial review and the mounting costs of litigation.

Several years later, in a congressional hearing on the Negotiated Rulemaking Act of 1987, Representative Don Pease observed that "administrative regulations often become the object of protracted litigation."⁴⁴ A leading sponsor of negotiated rulemaking legislation, Pease invoked a statistic that to this day continues to be cited to illustrate the need for negotiated rulemaking. "For example," Pease said, "roughly 80 percent of the 300 regulations issued each year by the Environmental Protection Agency end up in court. . . . For now, I would simply state that the Federal Government ought to be doing what it can to reduce unnecessary and

36. *Id.* app. §§ 1-5.

37. See ACUS Recommendation No. 85-5, *supra* note 32, reprinted in 1995 SOURCEBOOK, *supra* note 30, at 15; Formation of Negotiated Rulemaking Committees, 134 CONG. REC. 26,879, 26,881-82 (1988) (statement of Sen. Levin).

38. The 1982 ACUS recommendation formally called for legislation "explicitly authorizing agencies to conduct rulemaking proceedings" using a negotiated process. See ACUS Recommendation No. 82-4, *supra* note 32, reprinted in 1995 SOURCEBOOK, *supra* note 30, at 11.

39. See *Regulatory Negotiation: Joint Hearings Before the Senate Select Comm. on Small Bus. and the Subcomm. on Oversight of Gov't Management of the Senate Comm. on Governmental Affairs*, 96th Cong. 2 (1980) (statement of Sen. Nelson).

40. See *id.* at 2-3.

41. See *id.* at 6-8.

42. See *id.* at 89.

43. See *id.* at 128.

44. *Hearing on H.R. 3052, supra* note 14, at 21 (statement of Rep. Pease).

costly litigation."⁴⁵ In the same hearing on the 1987 bill, Senator Carl Levin testified that negotiated rules would be less vulnerable to challenge in court.⁴⁶ In addition, the chairman of the Administrative Conference, Marshall Breger, testified that negotiated rulemaking had arisen as a response to "the explosion in litigation that has occurred in the last 20 years regarding the United States Government's rules."⁴⁷ He, too, cited the 80 percent litigation rate of EPA rules as evidence of the problem.⁴⁸

In another hearing, Breger again testified that over three-quarters of EPA's rules were challenged in court.⁴⁹ Both he and Representative Pease subsequently repeated their belief that regulatory negotiation would reduce the number of judicial challenges.⁵⁰ Thomas Kelly, the director of EPA's Office of Standards and Regulations, testified that negotiated rulemaking would allow agencies to escape what he termed a "'regulate, litigate, regulate, litigate' syndrome."⁵¹ With testimony such as this, it was not surprising that the report of the Senate Committee on Governmental Affairs on the 1989 legislation stated that negotiated rulemaking would address "the poor quality of rules produced, the burdensome nature of the rulemaking process, the length of time it takes to promulgate rules, and the frequency of litigation that follows."⁵²

In a similar vein, the House committee report on the Negotiated Rulemaking Act of 1990 emphasized that negotiation would head off judicial challenges to agency rules.⁵³ The committee also cited the 80 percent litigation rate for EPA rules and concluded that negotiated rulemaking would reduce the volume of litigation.⁵⁴ During floor debate in the House, Representatives Pease

45. *Id.*

46. *See id.* at 28.

47. *Id.* at 35 (statement of Marshall L. Breger, chairman, ACUS).

48. *See id.*

49. *See Regulation Through Negotiation: The Negotiated Rulemaking Act: Hearings Before the Senate Comm. on Governmental Affairs*, 100th Cong. 6 (1988) [hereinafter *Regulation Through Negotiation*] (statement of Marshall L. Breger, chairman, ACUS).

50. *See Negotiated Rulemaking Act of 1989: Hearing Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary*, 101st Cong. 21, 23, 53 (1989).

51. *Regulation Through Negotiation*, *supra* note 49, at 8 (statement of Thomas Kelly, Director of EPA Office of Standards and Regulations).

52. S. REP. NO. 101-97, at 2 (1989).

53. *See* H.R. REP. NO. 101-461, at 8-9 (1990).

54. *See id.* at 9, 17.

and James indicated that reducing litigation was a major purpose of the Act. Pease stated that "too often in the past, and currently, rules are promulgated by agencies and then those groups that are affected by the rule go into court and challenge it."⁵⁵ In contrast, he argued, negotiated rulemaking "would, hopefully, avoid the litigation which now costs a lot of money and also results in long, protracted proceedings before the rule can finally go into effect."⁵⁶ James similarly claimed that negotiated rulemaking would "encourage those parties who are most affected by the rules to try to address the problems that the administrative rules create prior to their being utilized in the administrative agencies which ultimately leads to very expensive litigation."⁵⁷

In the fall of 1990, Congress passed the Negotiated Rulemaking Act.⁵⁸ In adopting the Act, Congress found that "[a]gencies currently use rulemaking procedures that may . . . cause parties with different interests to assume conflicting and antagonistic positions and to engage in expensive and time-consuming litigation over agency rules."⁵⁹ Negotiated rulemaking, Congress announced, "can increase the acceptability and improve the substance of rules, making it less likely that the affected parties will resist enforcement or challenge such rules in court. It may also shorten the amount of time needed to issue final rules."⁶⁰ Upon signing the Act, President Bush affirmed that the legislation would encourage negotiation "as a means of avoiding costly and time-consuming litigation."⁶¹

The Negotiated Rulemaking Act of 1990 does not require agencies to use formal negotiated procedures for rulemaking. Rather, it authorizes a procedure through which an agency can bring interested parties into the rulemaking process before it issues a proposed rule. The procedure for negotiated rulemaking begins with a determination by the head of the agency that a negotiated process would be appropriate and consistent with the public inter-

55. 136 CONG. REC. H1855 (daily ed. May 1, 1990) (statement of Rep. Pease).

56. *Id.*

57. 136 CONG. REC. H10,966-67 (daily ed. Oct. 22, 1990) (statement of Rep. James).

58. Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, 104 Stat. 4969 (codified as amended at 5 U.S.C. §§ 561-570 (1994)).

59. *Id.* § 2(2), 104 Stat. at 4969 (codified at 5 U.S.C. § 561 (1994)).

60. *Id.* § 2(5), 104 Stat. at 4969 (codified at 5 U.S.C. § 561 (1994)).

61. Statement on Signing the Negotiated Rulemaking Act of 1990, 2 PUB. PAPERS 1716 (Nov. 29, 1990).

est, based on several criteria listed in the Act.⁶² These criteria include "a limited number of identifiable interests that will be significantly affected by the rule,"⁶³ a "reasonable likelihood" that representatives of such interests will negotiate in good faith,⁶⁴ and a "reasonable likelihood that a committee [of such representatives] will reach a consensus . . . within a fixed period of time."⁶⁵

After the agency makes a determination that negotiated rulemaking would be appropriate, the agency must publish a notice in the *Federal Register* indicating its intent to establish a negotiated rulemaking committee that will meet to reach a consensus on a proposed rule.⁶⁶ This notice needs to include, among other things, a description of the subject of the rulemaking, a list of the main interests likely to be affected by the rule, and a proposed list of persons who will represent these interests on the committee.⁶⁷ Interested parties have 30 days to submit comments on the notice and to apply for a seat on the committee.⁶⁸ The agency, after considering any comments or applications submitted, may establish a negotiated rulemaking committee if it still determines that one is appropriate. The Act limits the size of the committee to 25 members, "unless the agency head determines that a greater number . . . is necessary for the functioning of the committee or to achieve balanced membership."⁶⁹

Once constituted, the committee attempts to reach a consensus on a proposed rule. A designated person or persons from the agency "shall be authorized to fully represent the agency in the discussions and negotiations of the committee."⁷⁰ The agency may also appoint, with the approval of the committee, an impartial facilitator or mediator to chair the meetings and assist in the negotiations.⁷¹ If the negotiation process results in a "consensus" among the committee on language for a proposed rule,⁷² the committee is required to submit the rule, with an accompanying

62. See 5 U.S.C. § 563(a) (1994).

63. *Id.* § 563(a)(2).

64. *Id.* § 563(a)(3).

65. *Id.* § 563(a)(4).

66. See *id.* § 564(a).

67. See *id.* § 564(a)(2)-(4).

68. See *id.* § 564(c).

69. *Id.* § 565(b).

70. *Id.* § 566(b).

71. See *id.* § 566(c).

72. See *supra* note 10.

report, to the agency.⁷³ The agency, in turn, is expected to use the committee's rule as the basis for its own proposed rule.⁷⁴ The end product should be a rule that is more balanced and agreeable than it might otherwise be.

In addition to the Negotiated Rulemaking Act, Congress has adopted at least a dozen statutes that mandate specific agencies to use negotiated rulemaking to develop certain regulations.⁷⁵ Affected agencies include the Departments of Education, Health and Human Services, Housing and Urban Development, and Interior, as well as the Nuclear Regulatory Commission.

73. See 5 U.S.C. § 566(f).

74. See *id.* § 563(a)(7).

75. See, e.g., The Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, § 1431(b), 102 Stat. 130, 189 (requiring the Secretary of Education to "submit regulations on a minimum of 4 key issues to a modified negotiated rulemaking process as a demonstration of such process"); Price Anderson Amendments Act of 1988, Pub. L. No. 100-408, § 19, 102 Stat. 1066, 1083-84 (requiring the use of negotiated rulemaking to determine whether radiopharmaceutical licensees should be indemnified); Carl D. Perkins Vocational and Applied Technology Education Act Amendments of 1990, Pub. L. No. 101-392, § 501(c), 104 Stat. 753, 830 (requiring the Secretary of Education to "submit regulations on at least 2 key issues to a negotiated rulemaking process"); Higher Education Amendments of 1992, Pub. L. No. 102-325, § 497, 106 Stat. 448, 633 (stating that "after holding regional meetings and before publishing proposed regulations . . . the Secretary . . . shall submit such regulations to a negotiated rulemaking process"); Housing and Community Development Act of 1992, Pub. L. No. 102-550, § 114(b), 106 Stat. 3672, 3691 (requiring negotiated rulemaking for "any proposed regulation . . . chang[ing] . . . the performance funding system [for] vacant public housing units"); Student Loan Reform Act of 1993, Pub. L. No. 103-66, § 4021, 107 Stat. 341, 353 (requiring use of negotiated rulemaking for all standards, criteria, procedures, and regulations implementing the federal direct student loan program); Improving America's Schools Act of 1994, Pub. L. No. 103-382, § 1601(b), 108 Stat. 3518, 3609-10 (requiring negotiated rulemaking process for regulations implementing amendments to the Elementary and Secondary Education Act of 1965); Indian Self-Determination Contract Reform Act of 1994, Pub. L. No. 103-413, § 105(2), 108 Stat. 4250, 4269-70 (stating that "rulemaking processes under this Act . . . shall [be guided by] the 'Negotiated Rulemaking Act of 1990'"); Native American Housing Assistance and Self-Determination Act of 1996, Pub. L. No. 104-330, § 106(b), 110 Stat. 4016, 4029 (requiring the use of negotiated rulemaking for all regulations promulgated under the Act); Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, § 216, 110 Stat. 1936, 2007 (requiring negotiated rulemaking for regulations relating to a risk sharing exception to penalties provided under federal health care programs); Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriation Act of 1997, Pub. L. No. 104-180, § 734(d), 110 Stat. 1569, 1603 (requiring negotiated rulemaking for housing assistance regulations); Balanced Budget Act of 1997, Pub. L. No. 105-33, § 1856(a), 111 Stat. 251, 270 (requiring negotiated rulemaking for financial solvency standards for provider sponsored organizations under Medicare).

More recently, negotiated rulemaking has been visibly promoted by the Clinton administration. In March of 1993, President Clinton asked Vice President Gore to head a six-month review of the federal executive branch in order to make governmental operations more efficient. At the end of the first phase of this National Performance Review (NPR), the Vice President recommended that agencies increase their use of "consensus-based rulemaking." The NPR report issued in early September 1993 attributed a host of benefits to negotiated rulemaking, including: increased innovation in the substance of regulations; earlier implementation and an overall reduction of "time, money, and effort;" increased rates of compliance; "more cooperative relationships" between regulated parties and federal agencies; and "the potential for avoiding litigation."⁷⁶

Following the recommendation set forth in the NPR report, the Clinton administration took a variety of steps to increase the use of negotiated rulemaking across the federal government. In his September 30, 1993 Executive Order on regulatory review, Clinton directed each agency "to explore; and where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking."⁷⁷ In a memorandum accompanying the executive order, President Clinton specifically directed eighteen executive departments and agencies to identify at least one rule to develop through negotiated rulemaking in 1994, or to explain why negotiated rulemaking would not be feasible.⁷⁸ In early March 1995, with the newly-installed Republican Congress clamoring for comprehensive regulatory reform, President Clinton sent another memorandum to agency heads directing them "to expand substantially [their] efforts to promote consensual rulemaking" and to submit another "list of upcoming rulemakings that can be converted into negotiated rulemakings."⁷⁹ Finally, in a subsequently-re-

76. IMPROVING REGULATORY SYSTEMS, *supra* note 3, at 30.

77. Exec. Order No. 12,866, § 6(a), 3 C.F.R. 638, 645 (1994) *reprinted in* 5 U.S.C. § 601 (1994).

78. See President's Negotiated Rulemaking Memorandum, *supra* note 4, at 52,391. According to a General Accounting Office report, 17 agencies responded to the order and 16 identified rules that either "will use, or be considered for, a negotiated rulemaking." U.S. GENERAL ACCOUNTING OFFICE, MANAGEMENT REFORM: IMPLEMENTATION OF THE NATIONAL PERFORMANCE REVIEW'S RECOMMENDATIONS 519 (1994).

79. President's Memorandum on Regulatory Reform, Subject: Regulatory Reinvention Initiative, 1 PUB. PAPERS 304, 305 (Mar. 4, 1995).

leased strategy paper for "reinventing" federal environmental regulation, the Clinton administration specifically directed the EPA to review all its rules to identify potential candidates for negotiated rulemaking.⁸⁰

In 1996, the Subcommittee on Commercial and Administrative Law of the House Judiciary Committee held hearings on the reauthorization of the Negotiated Rulemaking Act.⁸¹ In testimony before the committee, Assistant Secretary of Labor for Occupational Safety and Health, Joseph Dear, reiterated concerns that before the 1990 Act rulemaking had fostered antagonism among the parties. "Many times," he testified, "the adversarial relationship resulted in time-consuming expensive litigation."⁸² Neil Eisner, an Assistant General Counsel at the Department of Transportation, testified that the process of negotiating a regulation "should make the rule more acceptable to all of the parties and should make them less likely to challenge it."⁸³ Testifying on behalf of the American Bar Association, Philip Harter quoted a Carnegie Commission report to the effect that "the use of negotiation often saves EPA a year or two of 'rulemaking' time."⁸⁴ In floor discussion, Senator Levin stated that "[a]gencies and others have discovered that, in many rulemaking situations, negotiation beats confrontation in terms of cost, time, aggravation, and the ability to develop regulations that parties with very different per-

80. See PRESIDENT BILL CLINTON & VICE PRESIDENT AL GORE, REINVENTING ENVIRONMENTAL REGULATION 5 (1995).

81. See *Reauthorization of the Negotiated Rulemaking Act: Hearings Before the Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary*, 104th Cong. 1 (1996) [hereinafter *1996 Reauthorization Hearings*]. In 1995, the same committee heard testimony from C. Boyden Gray on the reauthorization of ACUS in which Gray noted that "negotiated rulemaking . . . is a key building block of regulatory reform because of the elimination of legal challenges to rulemaking." *The Reauthorization of the Admin. Conference of the United States: Hearings Before the Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary*, 104th Cong. 33 (1995) (statement of C. Boyden Gray, partner, Wilmer, Cutler & Pickering and former General Counsel to President Bush).

82. *1996 Reauthorization Hearings*, *supra* note 81, at 53 (statement of Joseph A. Dear, Assistant Secretary, Occupational Safety and Health Administration). Dear also suggested that "the ramifications associated with litigation [are] reduced" by the negotiated rulemaking process. *Id.*

83. *Id.* at 94 (statement of Neil Eisner, Assistant General Counsel for Regulation and Enforcement, United States Department of Transportation).

84. *Id.* at 69 (statement of Philip Harter on behalf of the American Bar Association) (quoting CARNEGIE COMM'N ON SCIENCE, TECH., & GOV'T, RISK AND THE ENVIRONMENT: IMPROVING REGULATORY DECISION MAKING 111 (1993)).

spectives can accept.”⁸⁵ Virtually all of the legislative discussion on the reauthorization of the Negotiated Rulemaking Act affirmed the success of regulatory negotiation and its continued potential for, among other things, saving time and reducing legal challenges. Without much fanfare, legislation permanently reauthorizing the Act passed through both houses of Congress and was signed by President Clinton on October 19, 1996.⁸⁶

As this brief history demonstrates, negotiated rulemaking has at various times been advertised as something of a cure-all for most regulatory ills—making rules faster, better, and more effective, while making affected parties satisfied, empowered, and better informed. Proponents have emphasized that the primary purposes of negotiated rulemaking are to reduce rulemaking time and decrease litigation over regulations.⁸⁷ With Congress and the President directing more agencies to use negotiated rulemaking procedures, it is important to assess how effectively negotiated rulemaking has achieved its two main purposes.

II. THE PERFORMANCE OF NEGOTIATED RULEMAKING

In the past, most research on negotiated rulemaking has drawn on case studies of specific negotiations. Recently, more systematic research that attempts to evaluate the negotiated rulemaking process has begun to emerge. Much of this work is still underway. Brian Polkinghorn, for example, has conducted extensive interviews with agency staff at the EPA that show how the use of negotiated rulemakings represents a philosophical shift in EPA rulemaking towards incorporating the views of outside groups.⁸⁸ Cornelius Kerwin and Laura Langbein have completed the first phase of an evaluation of regulatory negotiation at EPA

85. 142 CONG. REC. S11,849 (daily ed. Sept. 30, 1996) (statement of Sen. Levin).

86. See Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870, 3873.

87. In the first appellate court opinion to examine the purposes of the Negotiated Rulemaking Act, Judge Richard Posner confirmed that “[t]he Act’s purpose [is] to reduce judicial challenges to regulations by encouraging the parties to narrow their differences in advance of the formal rulemaking proceeding.” *USA Group Loan Servs., Inc. v. Riley*, 82 F.3d 708, 715 (7th Cir. 1996).

88. See Brian Polkinghorn, *The Influence of Regulatory Negotiations on the U.S. Environmental Protection Agency as an Institution* (1995) (unpublished paper presented at the 1995 American Political Science Association meeting, on file with the *Duke Law Journal*).

and have reported data drawn from interviews with over a hundred individuals involved in EPA negotiated rulemakings.⁸⁹ They found that the participants they interviewed tended overall to view the process favorably.⁹⁰ As Kerwin and Langbein acknowledge, their conclusions are tentative in that their first phase was limited to a study of only eight negotiated rulemakings convened by the EPA without any comparison to conventional rulemaking.⁹¹ Preliminary results from the second phase of their study show that participants in conventional EPA rulemakings similarly view the conventional process favorably.⁹²

89. See CORNELIUS KERWIN & LAURA LANGBEIN, AN EVALUATION OF NEGOTIATED RULEMAKING AT THE ENVIRONMENTAL PROTECTION AGENCY: PHASE I (1995) (report prepared for ACUS).

90. See *id.* at 37 ("Seventy-eight percent responded that the benefits [they realized from participation] did exceed the costs."). Even among their respondents, however, the level of support for negotiated rulemaking varies considerably. For example, they find that representatives from environmental groups reported significantly less satisfaction with the formal negotiation process. See *id.* at 40. For examples of environmental group dissatisfaction with regulatory negotiation, see Cindy Skrzycki, *Emission Impossible: The EPA Takes on Lawn Tool Makers*, WASH. POST, June 21, 1996, at D1 (reporting disappointment over an informal agreement between EPA and industry following a negotiated rulemaking); *Citizens Coal Council Declines OSM's Invitation to Join "Reg-Neg,"* INSIDE ENERGY WITH FEDERAL LANDS, June 13, 1994, at 15 (describing citizen group's rejection of agency's invitation to participate in a negotiated rulemaking).

91. KERWIN & LANGBEIN, *supra* note 89, at 7, 46, 48. It is not clear from Kerwin and Langbein's first phase report whether the eight rulemakings were selected at random or on the basis of other selection criteria. They report that seven of the eight rulemakings had been "successfully concluded" and one failed to result in a consensus-proposed rule. *Id.* at 2. Only six of their 101 interview respondents came from the one "failed" negotiation. Furthermore, due to difficulties in locating respondents, Kerwin and Langbein dropped from their sample the farmworker protection negotiation, which had encountered considerable controversy. See *id.* at 5-6. Although these sampling limitations may constrain the conclusions one can draw from Kerwin and Langbein's otherwise ambitious research, their sample does include seven of the 12 negotiated rules that EPA has finalized, including four rules over which petitions for review were filed. See *id.* at 2-3. It is not clear from the first phase report how respondents were selected nor how many respondents came from EPA, industry, and environmental groups, categories which have significantly different overall ratings of negotiated rulemaking. See *id.* at 40.

92. Kerwin and Langbein are continuing a second phase of their project that involves approximately 50 interviews with participants from six conventional EPA rulemakings. A preliminary draft of this second phase report was made available at the time this Article was in press. Although a full review of the second phase results cannot be made at this time, it bears noting that Kerwin and Langbein found no significant difference in the net value participants attributed to their participation in negotiated rulemaking as opposed to conventional rulemaking. See Cornelius Kerwin & Laura Langbein, *An Evaluation of Negotiated Rulemaking at the Environmental Protection Agency: Phase II: A Comparison of Conventional and Negotiated Rulemaking* 26 (Aug. 1997) (unpublished manuscript, on file with author) ("[T]here was both no statistically significant difference between the two

As these studies suggest, much of the current empirical analysis of negotiated rulemaking focuses on the EPA. Because the EPA has attempted and completed the most negotiated rulemakings,⁹³ and has figured prominently in past claims about both the need for, and success of, negotiated rulemaking,⁹⁴ researchers must continue to focus on the EPA in order to assess the performance of negotiated rulemaking. That said, a more comprehensive understanding of the impact of negotiated rulemaking can be gleaned from an initial examination of the extent to which other agencies have used consensus-based procedures.

Using searches of *Federal Register* notices supplemented with listings published by ACUS, I was able to identify a comprehensive dataset of negotiated rulemakings across all federal agencies.⁹⁵ The data reveal the overall infrequent use of negotiated rulemaking at the federal level. By the end of 1996, seventeen federal agencies had initiated at least one negotiated rulemaking process (Table 1). Each of these agencies had initiated an average of 4 (or median of 2) negotiated proceedings. Of the seventeen agencies, only twelve had actually issued a final rule based on a regulatory negotiation. As a point of comparison, almost sixty regulatory agencies are listed in a recent unified agenda of federal regulations,⁹⁶ and over fifty agencies regularly have their rules reviewed by the Office of Management and Budget.⁹⁷

groups and overwhelming majorities (85% for reg negs and 76% for conventional rulemaking) who stated that the benefits they realized from participation equalled or exceeded the costs.”).

93. See *infra* Table 1.

94. See, e.g., IMPROVING REGULATORY SYSTEMS, *supra* note 3, at 31 (using EPA to illustrate purported time savings and reduction in litigation from negotiated rulemaking); Susskind & MacMahon, *supra* note 17, at 133 (relying on EPA case studies to suggest the “great promise” of negotiated rulemaking). ACUS has reported that “[o]nly one agency, EPA, has institutionalized negotiated rulemaking with a small full-time staff to evaluate candidates for either reg-neg or other consensus-building processes and to manage the process ultimately selected.” ACUS, BUILDING CONSENSUS, *supra* note 12, at 16.

95. The Negotiated Rulemaking Act requires agencies to publish a notice in the *Federal Register* “that the agency intends to establish a negotiated rulemaking committee to negotiate and develop a proposed rule.” 5 U.S.C. § 564(a)(1) (1994).

96. See Introduction to The Regulatory Plan and the Unified Agenda of Federal Regulatory and Deregulatory Actions, 61 Fed. Reg. 62,005, 62,005-06 (1996).

97. See OFFICE OF MANAGEMENT AND BUDGET, REGULATORY PROGRAM OF THE UNITED STATES GOVERNMENT, APR. 1, 1991-MAR. 31, 1992 [hereinafter OMB, 1992 REGULATORY PROGRAM].

Table 1. Agency Use of Negotiated Rulemaking, 1983-1996

Agency	Abandoned	Pending	Final
Arch'l & Transp. Barriers Compl. Bd.	0	1	0
Dep't of Agriculture	1	1	1
Dep't of Education	1	0	6
Dep't of Energy	1	0	0
Dep't of Health & Human Services.	0	1	1
Dep't of Housing & Urban Dev.	0	1	1
Dep't of Interior	3	4	1
Dep't of Labor	0	2	2
Dep't of Transportation	0	4	7
Env'tl. Protection Agency	3	3	12
Equal Opportunity Empl. Comm'n	0	1	0
Farm Credit Admin.	0	0	1
Fed. Communications Comm'n	1	1	2
Fed. Trade Comm'n	1	0	0
Interstate Commerce Comm'n	1	0	0
Nuclear Regulatory Comm'n	1	0	1
Pension Benefit Guar. Corp.	0	0	1

Sources: On-line searches of *Federal Register* volumes from 1980 through 1996 were made and supplemented with a review of reports published by the Administrative Conference of the United States. The category of "abandoned" rules represents those rulemakings for which, at some point following publication of the intent to establish a negotiated rulemaking committee, the agency failed to commence negotiations, the agency disbanded an established committee prior to attempting to reach even a limited resolution, or the agency withdrew the underlying rulemaking altogether. The category "pending" represents those rulemakings for which a negotiated rulemaking committee was utilized but for which a final rule had yet to be promulgated by the end of 1996. The category of "final" represents those negotiated rulemakings that have resulted in at least one final rule, notwithstanding subsequent efforts to make further revisions or promulgate additional rules. Appendices A, B, and C contain citations to the rulemakings in each of these three categories.

Of the sixty-seven negotiated rulemakings that had been announced by the end of 1996, in 13 proceedings (or nearly 20 percent) the agency abandoned the formal negotiated process before any consensus could develop.⁹⁸ Nineteen of the rulemakings re-

98. By "abandoned," I do not mean that the participants failed to reach a consensus. Rather, I refer to those rules for which, at some point after the agency published an intent to negotiate, the agency decided not to commence negotiations, disbanded the committee before seeking even a limited agreement, or withdrew the underlying regulatory action altogether. Appendix A contains citations to the notices of intent to negotiate for this category of "abandoned" negotiations. In one instance, the Department of Interior

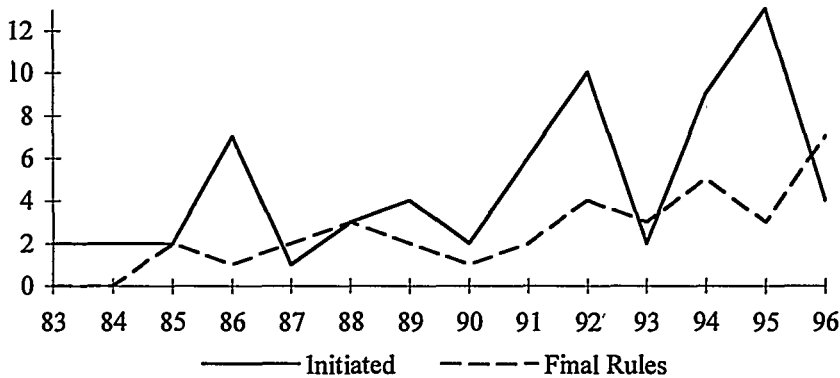
ained pending, with a final rule yet to be issued.⁹⁹ Since 1983, when the FAA initiated the first negotiated rulemaking, federal agencies have promulgated only thirty-five rules using the alternative procedure, or about 2.7 each year.¹⁰⁰

Compared with the number of federal agencies and the volume of rules promulgated each year, this level of rulemaking is low. Figure 1 shows the annual number of negotiated rules initiated and promulgated from 1983 to 1996. The use of negotiated rulemaking has increased somewhat in recent years, following the

(DOI) did not publish a separate notice of intent for one of its negotiated rulemakings. The citation listed in Appendix A for the DOI offshore air quality rulemaking refers to the earliest *Federal Register* notice that acknowledged DOI's decision to use formal negotiation for this rulemaking.

99. Appendix B contains citations to the notices of intent to negotiate these nineteen rules. Extensive searches of the *Federal Register* were made to confirm the status of these pending rulemakings as of the end of 1996.

100. Appendix C contains citations to the final negotiated rules promulgated by the end of 1996. In compiling this list of final rules, I made three choices that should be noted. First, one negotiated rulemaking, on Indian self-determination, was jointly convened by both the Department of Interior and the Department of Health and Human Services. I have treated it as one rulemaking, even though it is counted twice in the breakdown by agency in Table 1. See *Indian Self-Determination*, 61 Fed. Reg. 32,482 (1996). Second, I have included in this listing only one of the Department of Education's final rules which emerged from its modified negotiated rulemaking process under the Higher Education Amendments of 1992. See *Higher Education Amendments of 1992*, 59 Fed. Reg. 22,348 (1994). The process was modified in the sense that the Department presented the negotiated rulemaking committee with draft proposed rules at the outset of the committee process. The committee participants divided into several meetings and the agency promulgated three additional final rules. See *Institutional Eligibility Under the Higher Education Act of 1965, as amended; Eligibility of Foreign Medical Schools Under the Guaranteed Student Loan Program (GLSP)*, 59 Fed. Reg. 22,062 (1994) (codified at 34 C.F.R. pts. 600 & 601); *Secretary's Procedures and Criteria for Recognition of Accrediting Agencies*, 59 Fed. Reg. 22,250 (1994) (codified at 34 C.F.R. pt. 602); *Institutional Eligibility Under the Higher Education Act of 1965, as amended*, 59 Fed. Reg. 22,324 (1994) (codified at 34 C.F.R. pt. 600). By including only one higher education rule, I have followed the categorization of ACUS which lists the process as a single negotiated rulemaking proceeding. See ACUS, *BUILDING CONSENSUS*, *supra* note 12, at 45-46. The findings reported in this Article would not change in any substantial way if the three additional higher education rules were included in the analysis. Finally, I have treated the EPA's disinfectant byproducts negotiated rulemaking as having been completed, even though in actuality only one of the three proposed rules to emerge from that set of negotiations has been made final. See *Drinking Water Information Collection Rule*, 61 Fed. Reg. 24,354 (1996) (codified at 40 C.F.R. pt. 141). Two additional proposed rules, which would set substantive drinking water standards, remain pending from the disinfectant byproducts negotiation. See *Disinfectants and Disinfection Byproducts*, 59 Fed. Reg. 38,668 (1994) (to be codified at 40 C.F.R. pts. 141 & 142) (proposed July 29, 1994); *Enhanced Surface Water Treatment Requirements*, 59 Fed. Reg. 38,832 (1994) (to be codified at 40 C.F.R. pts. 141 & 142) (proposed July 29, 1994).

Figure 1. Negotiated Rulemakings, 1983-1996

Negotiated Rulemaking Act and the various presidential and statutory directives. Nevertheless, the overall proportion of agency regulations adopted using negotiated rulemaking remains consistently small—less than one-tenth of one percent, as shown in Table 2. In comparison with overall regulatory activity, then, the rate of negotiated rulemakings has been minuscule.¹⁰¹ In these terms, negotiated rulemaking certainly is very much still “a novelty in the administrative process,” as Judge Richard Posner opined in a recent Seventh Circuit decision.¹⁰²

Whatever the purported benefits of negotiated rulemaking, agency staff appear not to perceive these benefits as a singularly motivating factor. Indeed, Polkinghorn reports that “the negotiati-

101. A similarly low rate probably exists at the state level as well, notwithstanding recent statutes in several states authorizing the use of negotiated rulemaking. *See, e.g.*, FLA. STAT. ANN. § 120.54(2)(d)(1) (West 1996 & Supp. 1997) (allowing for negotiated rulemaking and outlining procedural requirements); IDAHO CODE § 67-5220 (1995) (encouraging informal negotiations prior to the promulgation of an agency rule); MONT. CODE ANN. § 2-5-101-110 (1995) (establishing framework for negotiated rulemaking); NEB. REV. STAT. ANN. § 84-921-932 (Michie 1993) (establishing framework for negotiated rulemaking).

102. *USA Group Loan Servs., Inc. v. Riley*, 82 F.3d 708, 714 (7th Cir. 1996); *see also* Mark E. Rushefsky, *Reducing Risk Conflict by Regulatory Negotiation: A Preliminary Evaluation*, in *SYSTEMATIC ANALYSIS IN DISPUTE RESOLUTION* 109, 120 (Stuart S. Nagel & Miriam K. Mills eds., 1991) (“[N]egotiated rule-making is in its infancy, an experiment . . .”). *But see* Philip J. Harter, *First Judicial Review of Reg Neg a Disappointment*, *ADMIN. & REG. L. NEWS*, Fall 1996, at 1, 12 (arguing that Judge Posner’s “phrase seems more designed to trivialize the process than any sort of historical description”).

Table 2. Negotiated Rulemaking as Percentage of Final Rules

Year	Final Rules	Final Negotiated Rules	Percent
1983	3931	0	0.00%
1984	3515	0	0.00%
1985	3351	2	0.06%
1986	3287	1	0.03%
1987	3295	2	0.06%
1988	3442	3	0.09%
1989	3416	2	0.06%
1990	3174	1	0.03%
1991	3184	2	0.06%
1992	3022	4	0.13%
1993	3184	3	0.09%
1994	3567	5	0.14%
1995	3473	3	0.09%
1996	3762	7	0.19%
Total	47603	35	0.07%

Sources: The numbers for final rules were obtained using computer searches conducted by year in the LEXIS Fedreg database. I used a restrictive search that retrieved all documents containing the words "final rule" or "final rulemaking" in the action category, but excluded those documents with the words "correction," "technical amendment," or "clarification" in the same category. The numbers for final negotiated rules were obtained using searches in the *Federal Register* supplemented with a review of reports of the Administrative Conference of the United States.

on process has not been as popular with EPA employees as it was originally anticipated for resolving crucial rulemaking problems."¹⁰³ There are certainly any number of possible explanations for the infrequent reliance on negotiated rulemaking, including the inappropriateness of a formal negotiation process for many rules or the difficulties associated with chartering an advisory committee.¹⁰⁴ It may well also be that skepticism on the part of agency

103. Polkinghorn, *supra* note 88, at 13. *But cf.* KERWIN & LANGBEIN, *supra* note 89, at 40 (noting that among the participants interviewed, EPA officials gave the highest overall rating to negotiated rulemaking).

104. The procedural requirements associated with creating an advisory committee may serve to discourage the use of negotiated rulemaking. The statute reauthorizing the Negotiated Rulemaking Act directs the Office of Management and Budget to streamline Federal Advisory Committee Act (FACA) requirements and make recommendations for further amendments to FACA that will encourage more negotiated rulemaking. *See* Ad-

staff partly explains why the use of negotiated rulemaking has made only a tiny dent in the overall regulatory activity of the federal government. Although a complete explanation for the infrequent use of negotiated rulemaking is beyond the scope of this Article, I do seek to consider whether the apparent reluctance of agency staff to use negotiated rulemaking is itself justified. In other words, should agency managers concerned with reducing regulatory delays and avoiding litigation use negotiated rulemaking more frequently?

A. *The Length of Negotiated Rulemaking Proceedings*

One advantage formal negotiated rulemaking purportedly has over informal rulemaking is its ability to produce rules in less time. Yet the impact negotiation has on the time it takes to develop a regulation remains unclear. In a 1987 article, former EPA Administrator Lee Thomas stated that "as we look back upon our experiences with negotiated rules so far, they have saved time. Regulatory negotiation shortened our total process on each one of them."¹⁰⁵ The National Performance Review report on the regulatory process similarly stated that negotiated rulemaking at EPA has saved up to eighteen months compared with conventional rulemaking.¹⁰⁶ Despite this proclaimed efficiency, the NPR authors also interestingly cautioned Congress not to impose "short

ministrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 11, 110 Stat. 3870, 3873-74. See generally Stephen P. Croley, *Practical Guidance on the Applicability of the Federal Advisory Committee Act*, 10 ADMIN. L.J. AM. U. 111, 119-23 (1996) (discussing the uncertainties and burdens associated with FACA).

105. Thomas, *supra* note 29, at 3. The final ACUS report on negotiated rulemaking quotes Sheldon M. Guttman, Associate General Counsel and Dispute Resolution Specialist at the Federal Communications Commission (FCC), as concluding that "[t]he Commission continues to view negotiated rulemaking as a time saving and cost effective method of developing standards. . . . We have found that negotiated rulemaking forces parties to focus quickly on the key issues and ultimately saves us time and money in rulemaking matters." ACUS, BUILDING CONSENSUS, *supra* note 12, at 27. It is difficult to say on what basis the FCC made such a "finding" of the "ultimate" time savings of negotiated rulemaking. At that time, the FCC had only finalized one rule through a formal negotiated rulemaking process. See Provision of Non-Voice Low Earth Orbit Satellite Services, 58 Fed. Reg. 68,053 (1993) (codified at 47 C.F.R. pts. 2 & 25) (FCC). The experience of the FCC in finalizing negotiated rules was so limited at that time that the same ACUS report that quoted Guttman did not list any FCC negotiated rule as having been completed. ACUS, BUILDING CONSENSUS, *supra* note 12, at 63-64 (listing no final rule for the FCC in its table of federal negotiated rulemakings).

106. See IMPROVING REGULATORY SYSTEMS, *supra* note 3, at 32-33 n.8.

statutory deadlines to issue proposed or final rules, especially if they are shorter than two years [because this may] preclude the use of negotiated rulemaking."¹⁰⁷ In at least one instance, a federal agency decided that "negotiated rulemaking was not a practical option" for the development of regulations because of statutory time constraints.¹⁰⁸ Although negotiated rulemakings may not be sufficiently fast when an agency must meet stringent deadlines, overall they have been thought to be potential time-savers.¹⁰⁹

To measure the impact of negotiated rulemaking on regulatory development time, I analyzed the federal negotiated rulemakings that have been completed to date. The average negotiated rulemaking takes a little less than two and a half years to complete, from the time the agency announces its intent to form a negotiated rulemaking committee to the time the final rule is published (see Table 3). Among all 35 regulatory negotiations that have yielded final rules, the shortest took only about half a year to complete—Coast Guard regulations for drawbridges over the Chicago River (179 days).¹¹⁰ At the other extreme, the EPA's farmworker pesticide protection standards, which failed to achieve full consensus after one of the parties left the negotiation, took 2,528 days, or nearly seven years, to complete.¹¹¹ The average

107. *Id.* at 32.

108. Food Labeling Regulations, 56 Fed. Reg. 60,394, 60,397 (1991) (FDA). Ordinarily, of course, it has been thought that deadlines will help move negotiations along. *See infra* note 287 and accompanying text. It is not known how many agencies rule out the use of negotiated rulemaking due to concerns about deadlines. If it could be shown that many agencies do not use negotiated rulemaking because of deadline concerns, this finding would tend to undermine claims about time savings from negotiated rulemaking.

109. *See supra* notes 12, 31, 60 and accompanying text.

110. *See* Drawbridge Operation Regulations, Chicago River, IL, 60 Fed. Reg. 18,061, 18,061 (1995) (notice of intent to negotiate made on April 10, 1995) (U.S. Coast Guard); Drawbridge Operation Regulations, Chicago River, IL, 60 Fed. Reg. 52,298, 52,298 (1995) (final rule promulgated on October 6, 1995) (U.S. Coast Guard).

111. *See* Intent to Form an Advisory Committee to Negotiate Proposed Farmworker Protection Standards for Agricultural Pesticides, 50 Fed. Reg. 38,030 (1985) (notice of intent to negotiate published on Sept. 19, 1985); Worker Protection Standard, 57 Fed. Reg. 38,102 (1992) (final rule published on Aug. 21, 1992). To say that the worker protection rule is "completed" is somewhat of a misnomer. The rule is still subject to contentious debate. EPA has issued extensions and changes to the rule, Congress has entered the fray, and outside groups have threatened litigation. *See, e.g.,* Act of April 6, 1994, Pub. L. No. 103-231, 108 Stat. 333 (extending compliance dates for worker protection standards); *Worker Training Grace Period Suit Against EPA Likely*, 23 PESTICIDES & TOXIC CHEMICAL NEWS, Apr. 19, 1995, at 10 (discussing intention of several parties to sue the EPA depending on the length of the worker training grace period found in the worker protection standard); Brian Broderick, *Pesticides: EPA Issues Changes to Farm*

number of days for completion so far has been 835 (with a standard deviation of 577); the median has been 651, or over one and three quarters years. Of course, a couple of years may seem short compared with the decades that certain notorious rulemakings sometimes seem to last, or it may seem somewhat long compared with the speed that some might expect of the government in addressing serious public concerns. What is needed is a standard for comparison, a group of comparable rules developed using conventional notice-and-comment procedures.¹¹²

Any number of variables may offset the length of the rulemaking process, including the agency promulgating the rule, the complexity of the rule to be issued, and the priority the rule holds for the agency. Establishing the comparability of two regulations is no easy matter, but Kerwin and Furlong made an initial attempt in their valuable study of the length of rulemaking at EPA.¹¹³ They compared the time of four negotiated EPA rulemakings with the average time for all EPA rulemakings that entered into the agency's internal regulatory development management system during fiscal years 1987-1990. The latter group amou-

Worker Re-Entry, Training, Exemption Provisions, 19 Chem. Reg. Rep. (BNA) 101 (Apr. 28, 1995) (detailing five changes to the worker protection standard); *Farmworker Group Plans to Sue Over EPA's Final WPS Changes*, 23 PESTICIDE & TOXIC CHEMICAL NEWS, May 23, 1995, at 7 (analyzing the changes to the worker protection standard and the planned suit by the Farm Worker Justice Fund against the EPA); *Farmers and Workers Alike Find Fault with Worker Protection Standards*, 24 PESTICIDES & TOXIC CHEMICAL NEWS, July 17, 1996, at 10 (noting the concerns of farmers and workers with the changes to the worker protection standard). My findings, of course, do not show that negotiated rulemaking has caused this contentiousness or made the worker protection standards the longest negotiated rulemaking undertaken by any agency. Rather, they show that even with negotiated rulemaking procedures this rule could not be completed within a short amount of time, because negotiation cannot resolve all underlying value conflicts and disputes over scientific evidence. Negotiated rulemaking may have given the agency some information (for it is hard to imagine conversations with agency staff members that would not provide some information), but that information did not make this a short rulemaking.

112. Some readers may begin to wonder whether I have chosen the appropriate set of rules for comparison in the analyses to follow. As I explain in the text, the types of rules I compare in this Article are identical to those others have used in the past to support claims about the impact of negotiated rulemaking, in the few instances where such claims have been supported with data. In Part III.A of this Article, I examine the issue of "treatment" and "control" groups more closely, paying attention to the possibility of bias in the rules selected for formal negotiation. That analysis confirms the appropriateness of the comparison groups I use. See *infra* Part III.A.

113. See Cornelius M. Kerwin & Scott R. Furlong, *Time and Rulemaking: An Empirical Test of Theory*, 2 J. PUB. ADMIN. RES. & THEORY 113 (1992).

Table 3. Time for Completed Negotiated Rulemakings, 1985-1996

Agency	Negotiated Rulemaking	Reg-Neg Announced	Final Rule Published	Days
DOT	Flight Time Requirements	5/12/83	7/18/85	798
DOL	Occup'l Exp. to Benzene	7/8/83	9/11/87	1526
EPA	Nonconformance Penalties	4/24/84	8/30/85	493
EPA	Emergency Pesticide Exemptions	8/3/84	1/15/86	530
EPA	Farmworker Protection Standards	9/19/85	8/21/92	2528
DOL	4,4'-Methylenedianiline	10/22/85	8/10/92	2484
EPA	Residential Woodstoves	2/7/86	2/26/88	749
EPA	Underground Injection	7/14/86	7/26/88	743
EPA	RCRA Permit Modifications	7/16/86	9/28/88	805
DOT	Nondiscrimination in Air Travel	8/22/86	3/6/90	1292
NRC	Waste-Site Licensing Records	12/18/86	4/14/89	848
EPA	Asbestos in Schools	1/13/87	10/30/87	290
DOE	Financial Assist. for Special Educ.	7/12/88	5/19/89	311
EPA	VOC Equipment Leaks	4/25/89	4/22/94	1823
DOT	Handicapped Parking	6/12/89	3/11/91	637
DOA	Control of Scrapie	7/13/89	12/9/92	1245
DOE	Vocational & Technology Educ.	10/12/90	8/14/92	672
DOT	Transp. for Disabled	1/11/91	9/6/91	238
EPA	Clean Fuels	2/8/91	2/16/94	1104
DOT	Oil Spill Vessel Response Plans	11/18/91	1/12/96	1516
EPA	Coke Oven Batteries	1/15/92	10/27/93	651
FCC	Non-Voice Satellite Servs.	5/1/92	12/23/93	601
FCA	Administrative Expenses	5/6/92	2/23/93	293
DOE	Higher Educ. Amendments	8/26/92	4/29/94	611
EPA	Drinking Water Info. Collection	9/15/92	5/14/96	1337
EPA	Wood Furniture Coatings	11/25/92	12/7/95	1107
DOE	Direct Student Loans	12/28/93	12/1/94	338
DOE	Guaranty Agency Reserves	1/19/94	11/25/94	310
DOT	Roadway Worker Protection	8/17/94	12/16/96	852
DOE	Disadvantaged Students	10/28/94	7/3/95	248
FCC	Hearing Aid Compatible Telephones	11/23/94	8/14/96	630
HHS/DOI	Indian Self-Determination	12/29/94	6/24/96	543
HUD	Subsidies for Public Housing	1/3/95	2/28/96	421
DOT	Chicago Drawbridge Operations	4/10/95	10/6/95	179
PBGC	Reportable Events	8/11/95	12/2/96	479

Abbreviations: DOA - Dept. of Agriculture; DOE - Dept. of Education; DOI - Dept. of Interior; DOL - Dept. of Labor; DOT - Dept. of Transp.; EPA - Env'tl. Protection Agency; FCA - Farm Credit Admin.; FCC - Fed. Communications Comm'n; HHS - Dept. of Health & Human Servs.; HUD - Dept. of Housing & Urban Develop.; NRC - Nuclear Regulatory Comm'n; PBGC - Pension Benefit Guar. Corp.

nted roughly to the most substantial 15 percent of all EPA rules adopted during this period.¹¹⁴

In calculating the length of a rulemaking, Kerwin and Furlong relied on internal EPA files to determine the date when each rule entered into the agency's regulatory development management system and the date when it was finalized. They found that the rules in their study took an average of 3.0 years (1108 days) from start to finish. In contrast, the four negotiated rules initiated during the time period of their study took an average of only 2.1 years (778 days) to complete, a time savings of eleven months.¹¹⁵ Although Kerwin and Furlong acknowledged that the number of negotiated rules in their study was small, they interpreted their data to demonstrate that negotiated rulemaking is "more expeditious" than conventional rulemaking.¹¹⁶ Their analysis underlies the National Performance Review report's claim that regulatory negotiation is faster than conventional rulemaking.¹¹⁷

Of course, if all twelve of EPA's negotiated rules are examined, rather than just four, the suggested time savings of negotiated rulemaking could well be different.¹¹⁸ To determine the

114. As Kerwin and Furlong noted, they limited their analysis "to those rules developed under the normal rulemaking process in the agency. This left out of the study those classes of rules deemed sufficiently routine or inconsequential to be exempted from OMB review, as well as from most EPA internal management requirements." *Id.* at 122. Their sample included 150 rules that EPA initiated between October 1, 1986, and September 30, 1989. *See id.* My research shows that during this same period, EPA issued approximately 1000 final rules, excluding corrections and technical amendments.

115. *See id.* at 124, 134. The median time found by Kerwin and Furlong, however, does not show any notable time savings. The median time for negotiated rules (868 days) was virtually the same as the median time for all rules (872 days). *See id.* at 134.

116. *Id.* at 124.

117. *See* IMPROVING REGULATORY SYSTEMS, *supra* note 3, at 32-33 n.8 (citing Kerwin & Furlong, *supra* note 113, at 124). The National Performance Review report also refers to an interview with Chris Kirtz, the director of EPA's Office of Consensus and Dispute Resolution, indicating that EPA saved from 6 to 18 months with seven of its negotiated rulemaking proceedings. *See id.*

118. The twelve negotiated rules are those for which the EPA has promulgated a final rule. *See infra* Appendix C. All 12 of these rules are included in EPA's internal list of negotiated rulemakings, as are three negotiated rulemakings for which the agency has yet to issue a final rule. *See* U.S. Envtl. Protection Agency, Negotiated Rulemaking at the Environmental Protection Agency (1994) [hereinafter Negotiated Rulemaking at EPA]; *see also* ACUS, BUILDING CONSENSUS, *supra* note 12, at 55-63 (listing negotiated rulemaking proceedings at EPA). The only other rulemaking included on EPA's internal list is the lead acid battery recycling rule, *see id.* at 59, which I treat as "abandoned" because the EPA withdrew the entire rulemaking and adjourned the negotiation committee after several meetings. *See supra* note 98.

length of all EPA negotiated rulemakings, I calculated the difference in time between the date the agency announced its intent to create a negotiated rulemaking committee and the date the agency published its final rule in the *Federal Register*. Although this method differs from that used by Kerwin and Furlong in that it relies on published government records instead of internal agency files, my reliance on published materials turns out to favor time savings for negotiated rules. For example, *Federal Register* listings yield an average time for the four negotiated rules in the Kerwin and Furlong study of 1.8 years (647 days), more than four months shorter than the average they report for the same rules.¹¹⁹ The difference is likely explained by the considerable amount of preparatory work that goes into deciding whether and how to conduct a negotiated rulemaking, work which precedes the publication of a notice to establish a negotiation committee.

The average time period for all 12 of the negotiated rules promulgated by the EPA is 2.8 years (1013 days). The four negotiated rules in the Kerwin and Furlong study therefore turn out to be rather atypical, taking roughly half as long on average as the other rules.¹²⁰ In contrast to the eleven-month time savings sug-

119. In seeking to dismiss my findings as "meaningless" and "fundamentally flawed," Philip Harter has mischaracterized my method of analysis. See Philip J. Harter, *Fear of Commitment: An Affliction of Adolescents*, 46 DUKE L.J. 1389, 1421-22 & n.117 (1997). He invokes examples of rulemakings for which the Coast Guard and FAA published notices of proposed rulemakings before they initiated negotiated rulemaking processes. According to Harter, these examples show that using *Federal Register* notices as a basis for measurement "makes the process appear very long." *Id.* The implication is that I based my analysis on the earliest *Federal Register* notice I could find for a rulemaking. As I make clear in the text, however, I did not use early notices or advance notices of proposed rulemaking as a starting point for calculating rulemaking time. I used agency notices of intent to use negotiated rulemaking. The "clock" had not started "ticking" when the Coast Guard and FAA published their initial notices of proposed rulemaking. It only started ticking when the agencies announced their plans to use negotiated rulemaking.

120. It should be noted that one of these twelve rules, the disinfectant byproducts rule, is incomplete. The EPA has promulgated one final rule resulting from the negotiation, but it is a rule designed to collect additional data for the EPA to use in promulgating its substantive drinking water standards. See Drinking Water Information Collection Rule, 61 Fed. Reg. 24,354 (1996) (codified at 40 C.F.R. pt. 141). The substantive standards have been proposed but as of this writing were still pending while the agency gathered information under the ICR. See Enhanced Surface Water Treatment Requirements, 59 Fed. Reg. 38,832 (1994) (to be codified at 40 C.F.R. pts. 141 & 142) (proposed July 29, 1994); Disinfectants and Disinfection Byproducts, 59 Fed. Reg. 38,668 (1994) (to be codified at 40 C.F.R. pts. 141 & 142) (proposed July 29, 1994). By using the date of the first final rule to emerge from this negotiated rulemaking process, even though it is an information collection rule and not a drinking water standard, I introduce

gested by Kerwin and Furlong, my analysis of all of EPA's negotiated rules suggests (at most) little more than three months savings compared with the rules issued in the period studied by Kerwin and Furlong, a difference which could well be accounted for by choices of measurement.¹²¹ When the EPA's three pending negotiated rules are added, the time savings between the two procedures disappears altogether.¹²² If we were to assume, for sake of estimation, that the EPA had promulgated all three pending rules at the end of December 1996, the average time for promulgating negotiated rules at EPA would increase to 3.1 years (1129 days), three weeks longer than the average reported by Kerwin and Furlong for all EPA rules.¹²³

The whole of the available evidence on the time span of EPA's negotiated rules markedly contrasts with the claims of considerable time savings attributed to negotiated rulemaking. Of course, any comparison of negotiated and conventional rules may have its limits because the time it takes to develop rules is surely affected by factors other than just the use or nonuse of formal negotiated procedures.¹²⁴ Even though the EPA has conducted the

another deliberate bias in favor of finding a time savings in rules developed with negotiated rulemaking procedures. Cf. GARY KING ET AL., *DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH* 155-57 (1994) (cautioning against systematic measurement error).

121. As noted earlier, my method of calculating rulemaking time *underestimates* the internal rulemaking time by as much as four months when compared with the method used by Kerwin and Furlong. See *supra* text accompanying note 119.

122. These three pending negotiated rulemakings are the Hazardous Waste Manifests Rule, 57 Fed. Reg. 24,765 (1992) (EPA); the Architectural and Industrial Maintenance (AIM) Coatings Rule, 57 Fed. Reg. 1443 (1992) (EPA), and the Small Nonroad Engine Rule, 58 Fed. Reg. 33,061 (1993) (EPA). Each of these proceedings was still pending at the beginning of 1997.

123. See Kerwin & Furlong, *supra* note 113, at 134. Using the median length of rulemaking, the time differences are more mixed. The median time for the 12 completed EPA negotiated rules (777 days) is several months shorter than the median for all EPA rules (872 days). See *supra* note 115 and accompanying text. However, the median time for all 15 EPA negotiated rules is 1104 days, notably longer than the median for all EPA rules.

124. One factor delaying promulgation in some cases might be the intervention of governing legislation. In response to an earlier version of this Article, Philip Harter correctly noted that the volatile organic chemical equipment leaks rulemaking was delayed due to factors outside the negotiation process itself. See Harter, *supra* note 119, app. B, at 1425. The equipment leaks negotiations were conducted in the months prior to the passage of the 1990 Clean Air Act amendments, Pub. L. No. 101-549, 104 Stat. 2399 (1990). Following passage of the amendments, the EPA folded the equipment leaks rule into the larger Hazardous Organic Chemical Emission Rule, 59 Fed. Reg. 19,402 (1994) (codified at 40 C.F.R. pt. 80) (EPA). While the time EPA needed to promulgate this

most negotiated rulemakings of any agency, it still has only promulgated 12 rules (and has only three others pending). Yet as I discuss in Part III.A, it does not appear that these negotiated rules were prone at the outset to demand more of the EPA's time.¹²⁵ Moreover, the experience at EPA seems consistent with the impression of at least one other agency that has completed a number of rules through the negotiated rulemaking process. The Department of Education "has reported that it realized no significant time savings through the use of the process."¹²⁶

In addition, it is important to keep in mind that the mere passage of chronological time—from notice of intent to final rule—probably itself understates the amount of time devoted to negotiated rulemaking. After all, rules that the EPA issues in a shorter amount of "chronological time" may well reflect the expenditure of substantially *more* "aggregate time" by agency staff and interest group representatives. Rules that appear to take more chronological time may do so simply because they sit dormant while agency staff members tend to other matters.

Even though negotiated rulemaking at the EPA takes at least the same amount of chronological time as all rules studied by Kerwin and Furlong, by most accounts negotiated rulemaking demands much more concentrated amounts of time on the part of agency and non-agency participants.¹²⁷ To borrow a phrase from

particular negotiated rule may have been delayed by the passage of a statutory amendment, such delays surely afflict rules issued using conventional rulemaking procedures as well. Ideally, to account for any time-order changes in the length of rulemaking, it would be helpful to replicate the analysis conducted by Kerwin and Furlong and extend it to the present time. Despite the potential limitations inherent in a small, nonexperimental evaluation (as this one by necessity is) the comparisons made here do permit reasonable inferences about the impact of negotiated rulemaking. See *infra* notes 253–93 and accompanying text.

125. See *infra* notes 272–74, 281–93 and accompanying text.

126. ACUS, BUILDING CONSENSUS, *supra* note 12, at 29 n.38 (citing Memorandum from Ted Sky, Senior Counsel, Department of Education, to Judith Winston, General Counsel, Department of Education (Nov. 3, 1994)).

127. See, e.g., KERWIN, *supra* note 18, at 190 (stating that negotiated rulemaking demands an "extraordinary commitment of time" and "negotiation sessions themselves are demanding activities that can wreak havoc with normal work responsibilities"); Peter Schneider & Ellen Tohn, *Success in Negotiating Environmental Regulations*, 9 ENVTL. IMPACT ASSESSMENT REV. 67, 77 (1985) ("Regulatory negotiation is surprisingly resource intensive."); Siegler, *supra* note 17, at 10,651 ("A major disadvantage of the reg-neg process is that it can be extremely resource-intensive and stressful."); ACUS, BUILDING CONSENSUS, *supra* note 12, at 28 (reporting that Department of Agriculture has found negotiated rulemaking to be "expensive").

Brian Polkinghorn, negotiated rulemaking is a "time compressor."¹²⁸ The negotiated rulemaking process contains all the elements of the conventional procedure, but "in reg-neg all of them are compressed into one preemptive, intense, time consuming negotiated interaction."¹²⁹ As an early EPA report on the agency's experience with negotiated rulemaking described, "EPA managers who have been the Agency's negotiators have devoted far more time to the negotiations in which they were involved than they ordinarily would spend on a single rulemaking effort."¹³⁰ Once the negotiations are completed, moreover, EPA staff still must spend the additional time associated with drafting regulatory language and responding to comments. Even those who are otherwise positively inclined toward regulatory negotiation acknowledge that the process demands a considerable amount of time and resources up-front.¹³¹ When negotiated rulemaking compresses staff time in this way and still ends up taking at least as long as conventional rulemaking, it is impossible to conclude that it has successfully increased the speed of the regulatory process.

B. *Negotiated Rulemaking and Litigation*

If formal regulatory negotiations do not save agencies (or at least the EPA) much in the way of time, at least they are thought to stave off litigation. By bringing interested parties together to reach a consensus, the agency expects to avoid subsequent petitions for review. In this way, negotiated rulemaking could in theo-

128. Polkinghorn, *supra* note 88, at 28.

129. *Id.* at 4.

130. PROGRAM EVALUATION DIV., U.S. ENVTL. PROTECTION AGENCY, AN ASSESSMENT OF EPA'S NEGOTIATED RULEMAKING ACTIVITIES 8 (1987), *reprinted in* 1995 SOURCEBOOK, *supra* note 30, at 23, 30.

131. See, e.g., IMPROVING REGULATORY SYSTEMS, *supra* note 3, at 32 ("[T]he concentrated investment of effort and expense in the short term may be a serious obstacle."); Steven Kelman, *Adversary and Cooperationist Institutions for Conflict Resolution in Public Policymaking*, 11 J. POL'Y ANALYSIS & MGMT. 178, 200 (1992) (noting that "service in regulatory negotiations has proven to be quite time-consuming compared to the adversary process, which creates a problem for organizations with limited resources"); Daniel Fiorino, *Regulatory Negotiation as a Form of Public Participation*, in FAIRNESS AND COMPETENCE IN CITIZEN PARTICIPATION: EVALUATING MODELS FOR ENVIRONMENTAL DISCOURSE 223, 232 (Ortwin Renn et al. eds., 1995) ("Although negotiation may not take more time overall than a conventional rulemaking, the time demands are more concentrated.").

ry save the agency the time and resources it takes to litigate or settle a legal challenge.¹³²

As I showed in Part I, the goal of reducing litigation was a driving force behind the Negotiated Rulemaking Act.¹³³ According to some, negotiated rulemaking has achieved this goal. Former EPA Administrator Lee Thomas asserted that at his agency “[r]egulatory negotiation has reduced litigation.”¹³⁴ The National Performance Review reported a reduction in the 80 percent rate at which EPA rules are challenged to a rate of 20 percent following the introduction of negotiated rulemaking.¹³⁵ The former research director of ACUS has written that agencies developing rules through negotiation have succeeded in “dramatically reducing the rate of litigation over those rules.”¹³⁶

As NPR’s own report makes clear, rules promulgated following a regulatory negotiation are far from immune from legal challenge.¹³⁷ The EPA’s visibility rule for the Grand Canyon area is

132. See, e.g., Pritzker, *supra* note 29, at 51 (noting “[l]ong-term savings from reduced litigation”).

133. See *supra* notes 26–61 and accompanying text.

134. Thomas, *supra* note 29, at 1, 3.

135. See IMPROVING REGULATORY SYSTEMS, *supra* note 3, at 32 n.7.

136. Lubbers, *supra* note 29, at 1172. Other government officials agree that negotiated rulemaking has reduced litigation. See, e.g., *The Comprehensive Regulatory Reform Act of 1995: Hearings on S. 343 Before the Subcomm. on Admin. Oversight and the Courts of the Senate Comm. on the Judiciary*, 104th Cong. 11–14 (1995) (statement of ACUS Chairperson Thomasina V. Rogers) (stating that negotiated rulemaking “has produced rules that have engendered much less litigation than conventional rulemaking processes”); *Implementation of the Clean Air Act Amendments of 1990: Hearings Before the Senate Comm. on Env’t & Pub. Works*, 103d Cong. 53 (1993) (statement of EPA Administrator Carol M. Browner) (noting that regulatory negotiations “reduce chances of legal challenge”); Notice of Final Alternative Dispute Resolution Policy and Opportunity for Comment, 61 Fed. Reg. 40,424, 40,425 (1996) (Department of Interior) (stating that negotiated rulemaking can “reduce the high rate of litigation”); U.S. GENERAL ACCOUNTING OFFICE, CLEAN AIR RULEMAKING 5 (1995) (relating report of EPA officials that negotiated rulemaking can save time by “minimizing the likelihood of litigation after promulgation”). Academic researchers have reached similar conclusions. In its recent report on risk decisionmaking, the National Research Council noted that “litigation is reported to be less likely” following a negotiated rulemaking process. NATIONAL RESEARCH COUNCIL, *supra* note 13, at 202. Professor Cornelius Kerwin has written (somewhat tautologically) that “[w]hen the process works well all current indications are that litigation rates are quite low.” KERWIN, *supra* note 18, at 191.

137. As a matter of law, the mere fact that an agency secured the “consensus” of a negotiated rulemaking committee on a rule does not make that rule immune from judicial challenge. See 5 U.S.C. § 570 (1994) (“Nothing in this section shall bar judicial review of a rule if such judicial review is otherwise provided by law.”). A recurring issue in legal literature is whether negotiated rules should nevertheless be afforded greater

a notable example. Although not conducted under the auspices of the Negotiated Rulemaking Act, this visibility rule has been cited as a prominent illustration of the regulatory negotiation process' potential.¹³⁸ Beginning in the early 1980s, the EPA, in an attempt to improve visibility in the Grand Canyon National Park, confronted the question of emissions controls for the Navaho Generating Station (NGS), a coal-fired power plant located in northern Arizona. The issue pitted high control costs imposed on the power facility against aesthetic protection of one of the nation's most cherished natural wonders. After years of evaluation, in 1991, the EPA issued a proposed rule that would have required a seventy percent reduction in sulfur emissions based on thirty-day averages.¹³⁹ The proposed rule would have required an estimated \$2 billion in compliance costs for NGS, but it still fell short of environmental groups' goal of a ninety percent reduction based on three-hour averages.¹⁴⁰ The EPA subsequently facilitated a negotiation process involving the environmental groups and the NGS owners for the purpose of developing other possible approaches.¹⁴¹ Because the agency had already staked out a position that

deference by a reviewing court. Compare Wald, *supra* note 13, at 23 ("While consensus certainly may be an important factor in pursuing the meaning of [the arbitrary and capricious] standard, it is doubtful that consensus can displace the traditional judicial gloss which has accumulated over the past forty years."), with Philip J. Harter, *The Role of Courts in Regulatory Negotiation—A Response to Judge Wald*, 11 COLUM. J. ENVTL. L. 51, 64 (1986) ("[I]t may be appropriate for courts to alter their means of ensuring that agency action is not arbitrary or capricious if the rule is the product of regulatory negotiation."), and Derek Raymond McDonald, Note, *Judicial Review of Negotiated Rulemaking*, 12 REV. LITIG. 467, 480 (1993) ("Commentators promoting the use of negotiated rulemaking procedures by agencies have advocated that courts should alter their standard of review to encourage regulatory negotiation."). The Negotiated Rulemaking Act provides that "[a] rule which is the product of negotiated rulemaking and is subject to judicial review shall not be accorded any greater deference by a court than a rule which is the product of other rulemaking procedures." 5 U.S.C. § 570.

138. The EPA does not include the Grand Canyon visibility rules on its list of negotiated rulemakings conducted by the agency, nor does ACUS list it as a negotiated rulemaking in its reports. See Negotiated Rulemaking at EPA, *supra* note 118; ACUS, BUILDING CONSENSUS, *supra* note 12, at 55-63; 1995 SOURCEBOOK, *supra* note 30, at 387-95. The EPA did not invoke the procedures of the Negotiated Rulemaking Act in this rulemaking. The process of negotiation occurred after, rather than before, the publication of a proposed rule and the close of the comment period on that proposal.

139. See Revision of the Visibility FIP for Arizona, 56 Fed. Reg. 5173, 5178 (1991) (to be codified at 40 C.F.R. pt. 52) (proposed Feb. 8, 1991) (EPA).

140. See Rappoport & Cooney, *supra* note 17, at 632.

141. See Revision of the Visibility FIP for Arizona, 56 Fed. Reg. 38,399 (1991) (to be codified at 40 C.F.R. pt. 52) (EPA). The agency made no commitment to implement any approach agreed to by the participants, but instead said it would treat an agreement as

did not fully reflect either side's interests, each side had a reason to see if something better could be negotiated.¹⁴² After two months of intense negotiations, the participants reached an agreement that would yield a ninety percent reduction based on full year averages.¹⁴³ The EPA published a revised proposal based on the participants' recommendations and then promulgated the rule in a highly publicized ceremony with President Bush at the Grand Canyon.¹⁴⁴

The Grand Canyon visibility rulemaking has been described "as a prototype 'win-win' solution of an environmental problem and a model for other regulatory negotiations."¹⁴⁵ The process was featured prominently in a front-page *New York Times* article on EPA's use of negotiation as an alternative to "the lawsuit system."¹⁴⁶ Yet what has not been reported is that, notwithstanding the "virtually unprecedented cooperation between the governmental agency and the directly affected parties,"¹⁴⁷ the Grand Canyon visibility rule still ended up in federal court.¹⁴⁸ The rule was challenged not by participants to the negotiation, but by outsiders to the negotiated rulemaking process: the Central Arizona Water Conservation District and four other irrigation districts that purchased electricity from NGS, each claiming the visibility rule would increase their energy costs.¹⁴⁹

simply a recommendation. See *id.* at 38,401.

142. The participants reportedly agreed not to challenge the agency's final rule if it reflected a negotiated compromise. See Rappoport & Cooney, *supra* note 17, at 634.

143. See *id.*

144. See Approval and Promulgation of Implementation Plans: Revision of the Visibility FIP for Arizona, 56 Fed. Reg. 50,172 (1991) (codified at 40 C.F.R. pt. 52) (EPA); see also John E. Yang, *Bush Hails Grand Canyon Clean Air Pact*, WASH. POST, Sept. 19, 1991, at A8; Robert Pear, *Bush Hikes in the Grand Canyon, Mixing Politics and Governance*, N.Y. TIMES, Sept. 19, 1991, at B13.

145. Rappoport & Cooney, *supra* note 17, at 627.

146. Matthew L. Wald, *U.S. Agencies Use Negotiations to Pre-empt Lawsuits Over Rules*, N.Y. TIMES, Sept. 23, 1991, at A1. More recently, Senator Levin referred to the rule as one of negotiated rulemaking's success stories in a press release issued by his office announcing the signing of the Administrative Dispute Resolution Act of 1996, which permanently reauthorized the Negotiated Rulemaking Act. See Senator Carl Levin, *Clinton Signs Levin's Bill Encouraging Government Innovation*, Congressional Press Releases, Oct. 21, 1996, available in LEXIS, Nexis Library, Curnws File.

147. Central Ariz. Water Conservation Dist. v. United States, 990 F.2d 1531, 1545 (9th Cir. 1993).

148. See *id.* at 1533.

149. The United States Court of Appeals for the Ninth Circuit ultimately upheld the rule in a 15 page opinion issued a year and a half after the promulgation of EPA's final

The same *New York Times* article that hailed the visibility rule also referred to EPA's reformulated gasoline rule as a model of a successful negotiated rulemaking.¹⁵⁰ The 1990 Clean Air Act required the EPA to issue a rule mandating the use of oxygenated fuel to reduce urban smog in nonattainment areas. The EPA chose to use a formal negotiated rulemaking process to develop a proposal for this rule. The EPA selected representatives from the automobile, petroleum, and renewable fuel industries, as well as from the environmental community. After arduous and fragile negotiations, the parties reached what one report described as a "nearly litigation-proof agreement."¹⁵¹

Yet in terms of avoiding litigation and eliminating conflict, the reformulated gasoline rule has turned out to be anything but successful. Within ten days of the publication of the final reformulated gasoline rule in the *Federal Register*,¹⁵² both the American Petroleum Institute (API) and Texaco, Inc. filed petitions for judicial review, objecting to a provision in the final rule in which EPA would publish refiners' individual baseline standards instead of keeping this information confidential.¹⁵³ The American Automobile Manufacturers Association, the Association of International Automobile Manufacturers, and the Renewable Fuels Association intervened in these actions.¹⁵⁴ Following settlement discussions

rule. See *id.* at 1545.

150. See Wald, *supra* note 146, at A1. Similarly, in a forthcoming book Edward Weber singles out the reformulated gasoline rule as one successful use of "collaborative games" in environmental policymaking. Edward P. Weber, *Pluralism by the Rules: The Emergence of Collaborative Games in National Pollution Control Politics* 111-32 (Jan. 15, 1997) (unpublished manuscript, on file with the *Duke Law Journal*); see also Edward P. Weber & Anne M. Khademian, *From Agitation to Collaboration: Clearing the Air Through Negotiation*, 57 PUB. ADMIN. REV. 396 (1997) (using case study of reformulated gasoline to argue that regulatory negotiation has increased collaboration and timeliness while decreasing agitation and delay).

151. *Traditional Antagonists Agree On Makeup of Cleaner, Reformulated Fuel*, 22 ENV'T REP. (BNA) 1141 (Aug. 23, 1991).

152. Reformulated and Conventional Gasoline Standards, 59 Fed. Reg. 7716 (1994) (codified at 40 C.F.R. pt. 80) (EPA) [hereinafter Reformulated and Conventional Gasoline Standards].

153. See *American Petroleum Inst. v. EPA*, No. 94-1138 (D.C. Cir. filed Feb. 24, 1994); *Texaco, Inc. v. EPA*, No. 94-1143 (D.C. Cir. filed Feb. 25, 1994). The Texaco petition was jointly filed by Star Enterprise. See *id.* All of the petitions reported in notes 153, 156, 158, 161 and the accompanying text specifically challenged the reformulated gasoline rule cited in note 152.

154. See Clerk's Order Allowing Non-Party Motion to Intervene, *American Petroleum Inst. v. EPA*, No. 94-1138 (D.C. Cir. Apr. 15, 1994).

and an out-of-court agreement reached with the petitioners, EPA proposed and promulgated a revision to the final rule under which EPA would release only part of the baseline information and would treat claims of business confidentiality in accordance with the agency's ordinary standards for protecting confidentiality.¹⁵⁵

Two other petroleum companies filed petitions raising objections to the reformulated gasoline rule. First, Fina Oil and Chemical Company objected to the individual baseline assigned to it in the rule.¹⁵⁶ In response, EPA agreed to adjust Fina's baseline in an administrative proceeding.¹⁵⁷ Second, Amerada Hess Corporation filed a judicial review petition objecting to the limits EPA placed on fuel parameters.¹⁵⁸ The final rule relied on both a "simple model" and a "complex model" to establish fuel parameters. Amerada Hess argued that the limits EPA placed under the "simple model" were inconsistent with those under the "complex model."¹⁵⁹ EPA acknowledged the error and issued a direct final rule amending portions of the reformulated gasoline rule to address these concerns.¹⁶⁰

Although both of these petroleum companies were in theory represented on the Clean Fuel Negotiated Rulemaking Committee by other petroleum companies and by API, one petitioner challenging the reformulated gasoline rule had no direct or indirect representative on the committee. The National Tank Truck Carriers (NTTC), a trade association representing about 200 common carrier fuel transporters, also filed a petition for review against EPA.¹⁶¹ NTTC objected to provisions of the final reformulated gasoline rule that held common carrier tank truck companies liable

155. See Proposed Revisions to Reformulated and Conventional Gasoline Standards, 60 Fed. Reg. 40,009 (1995) (to be codified at 40 C.F.R. pt. 80) (proposed Aug. 4, 1995) (EPA); Modifications in the Treatment of Business Information Submitted Concerning Individual Baselines, 60 Fed. Reg. 65,571 (1995) (codified at 40 C.F.R. pt. 80) (EPA).

156. See *Fina Oil and Chem. Co. v. EPA*, No. 94-1142 (D.C. Cir. filed Feb. 25, 1994).

157. See Status Report of Respondent Environmental Protection Agency at 2, *American Petroleum Inst. v. EPA*, No. 94-1138 (D.C. Cir. Sept. 22, 1995) (status report for consolidated cases including No. 94-1142).

158. See *Amerada Hess Corp. v. EPA*, No. 94-1319 (D.C. Cir. filed Apr. 15, 1994).

159. See Statement of Issues to be Raised on Appeal at 1, *Amerada Hess Corp. v. EPA*, No. 94-1319 (D.C. Cir. filed May 25, 1994).

160. See Regulation of Fuels and Fuel Additives: Standards for Reformulated and Conventional Gasoline, 59 Fed. Reg. 36,944 (1994) (codified at 40 C.F.R. pt. 80) (EPA).

161. See *National Tank Truck Carriers, Inc. v. EPA*, No. 94-1323 (D.C. Cir. filed Apr. 18, 1994).

if fuel they transported for refiners did not meet the standards set out in the rule.¹⁶² NTTC argued that the Clean Air Act granted EPA the authority to establish fuel standards but not the authority to regulate the transportation of reformulated fuels.¹⁶³ It also argued that the final rule denied common carriers' equal protection rights because it left private carriers and jobbers immune from liability without any rational basis.¹⁶⁴ Following the submittal of NTTC's brief but before EPA submitted its response, both parties reached a settlement agreement under which the EPA would revise the final reformulated gasoline rule.¹⁶⁵ The judicial proceedings have been held in abeyance pending the implementation of the settlement agreement. As of early 1997, these revisions were still undergoing the intra-agency review process before being proposed in the *Federal Register*.¹⁶⁶

The litigation challenging the reformulated gasoline rule was only one manifestation of the persistence of conflict, notwithstanding the agency's efforts to secure consensus. The reformulated gasoline rule also distinguished itself by prompting intense public criticism. While few EPA regulations receive attention in the popular media (even in elite papers such as the *New York Times*),¹⁶⁷ the reformulated gasoline rule splashed across the papers following the introduction of the new fuel.¹⁶⁸ Citizens reported headaches and dizziness associated with methyl tertiary butyl ether (MTBE),

162. See Brief of Petitioner at 1-5, *National Tank Truck Carriers, Inc. v. EPA*, No. 94-1323 (D.C. Cir. June 1, 1995).

163. See *id.* at 11-33.

164. See *id.* at 33-39.

165. See Joint Motion to Vacate the Briefing Schedule and Stay Proceedings at 2, *National Tank Truck Carriers, Inc. v. EPA*, No. 94-1323 (D.C. Cir. July 13, 1995).

166. See Status Report of Respondent EPA at 2, *National Tank Truck Carriers, Inc. v. EPA*, No. 94-1323 (D.C. Cir. Jan. 27, 1997).

167. See Cary Coglianese & Margaret Howard, *Getting the Message Out: Regulatory Policy and the Press* 7-18 (1997) (unpublished manuscript presented at the 1997 American Political Science Association meeting, Washington, D.C.) (on file with author).

168. See, e.g., Agis Salpukas, *New Gas Arouses Grass-Roots Ire*, N.Y. TIMES, Feb. 18, 1995, at A37; David Ivanovich, *"Cleaner" Fuel Sparks Populist Revolt/Woes Over Reformulated Gas*, HOUS. CHRON., Apr. 14, 1995, at A1; Daniel P. Jones & Matthew Daly, *Some Question Safety of "Clean-Air Gasoline"*, HARTFORD COURANT, Mar. 25, 1995, at A1; Joyce Price, *Cleaner Fuel May Generate Ill Effects*, WASH. TIMES, Mar. 19, 1995, at A1; Rogers Worthington, *In Wisconsin, Cleaner Gasoline Has a Somewhat Soiled Reputation*, CHI. TRIB., Feb. 27, 1995, at 3; *New Fuel Mandated by the EPA has Many Motorists Sputtering*, CINCINNATI ENQUIRER, Feb. 24, 1995, at A10; *Reformulated Gas: New Fuel Becoming a "Hot-Button Issue"*, GREENWIRE, Feb. 21, 1995, spotlight story, available in LEXIS, Environmental Library, Cumws File.

the additive used to comply with the new standards. Others complained about higher fuel prices. To this day, press reports about the rule continue, though now they focus on cases of groundwater contamination with MTBE, a substance which is reported to be a possible carcinogen.¹⁶⁹

The API also subsequently challenged the final reformulated gasoline rule in an administrative action. It argued that the second phase of nitrogen oxide restrictions in the reformulated gasoline was inconsistent with the negotiated agreement and the Clean Air Act.¹⁷⁰ Although EPA claimed that only the first phase restrictions were addressed by the negotiated rulemaking committee, it responded to API's petition by soliciting further comments on that portion of the rule.¹⁷¹ Eventually, EPA rejected API's administrative motion arguing that the second phase restrictions were ruled out by neither the negotiated agreement nor the Clean Air Act.¹⁷²

Finally, the reformulated gasoline rule also earned the distinction of being the first U.S. regulation struck down by the World Trade Organization. Venezuela and Brazil successfully challenged the foreign refiner baseline provisions in the reformulated gasoline rule as discriminatory and in violation of trade rules.¹⁷³ The

169. See, e.g., William Carlsen, *Gas Additive's Needless Risk: MTBE Appears to be Tainting Water Without Cleaning Air*, S.F. CHRON., Sept. 15, 1997, at A1; Chris Bowman, "Clean Gas" Leaves Water Utilities with Bad Taste, SACRAMENTO BEE, Mar. 10, 1997, at A1; Chris Bowman, *MTBE in Drinking Water*, SACRAMENTO BEE, Jan. 21, 1997, at B6; Chris Bowman, *Ugly By-Product of Smog Busting Gas: Lake Pollution*, SACRAMENTO BEE, Jan. 14, 1997, at A1; *Perceived Merits, Demerits of MTBE Still Argued*, OIL & GAS J., Apr. 17, 1995, at 22; Mark Emond, *Widespread Health Complaints About RFG, MTBE Raise Concerns Over Program's Fate*, NAT'L PETROLEUM NEWS, Apr. 1995, at 35.

170. See Standards for Reformulated Gasoline, 61 Fed. Reg. 35,960 (EPA 1996) (petition for reconsideration; request for comment); Standards for Reformulated Gasoline, 62 Fed. Reg. 11,346 (EPA 1997) (denial of petition for reconsideration).

171. See Standards for Reformulated Gasoline, 61 Fed. Reg. at 35,962.

172. See Standards for Reformulated Gasoline, 62 Fed. Reg. at 11,350.

173. See World Trade Organization, Doc. No. WT/DS2/R, reprinted in *World Trade Organization: Report of Panel in United States—Standards for Reformulated Gasoline and Conventional Gasoline*, 35 I.L.M. 274, 279–91 (1996); see also Kantor Says He's Inclined to Appeal Panel's Ruling in Venezuelan Gas Case, 13 Int'l Trade Rep. (BNA) 100 (Jan. 24, 1996) (quoting U.S. Trade Representative Mickey Kantor as saying that he intends to appeal the adverse WTO panel finding on reformulated gasoline); *Appellate Body Faults U.S. in Gas Case, But Reverses on Conservation Exception*, 13 Int'l Trade Rep. (BNA) 703 (May 1, 1996) (discussing ruling of WTO's Appellate Body); *Appellate Body Formally Adopts Ruling Against U.S. Gasoline Rules*, 13 Int'l Trade Rep. (BNA) 833 (May 22, 1996) (discussing WTO's Dispute Settlement Body's acceptance of ruling by Appellate Body); Steve Charnovitz, *The WTO Panel Decision on U.S. Clean Air Act Regulations*, 13

EPA was forced to revisit issues in the reformulated gasoline rule again, issuing a revised rule more than three years after publishing its original final rule.¹⁷⁴ A rule that has been heralded as one of negotiated rulemaking's success stories demonstrates instead that the achievement of an initial consensus by no means guarantees the elimination of controversy.¹⁷⁵

The reformulated gasoline rule and the Grand Canyon visibility rule are but two illustrations that negotiated rulemaking is no panacea for conflict in the regulatory process.¹⁷⁶ In addition to the challenges filed against EPA rules, several of the Department of Education's negotiated rules have ended up in court. Student loan regulations, promulgated using negotiated rulemaking, have been challenged at both the district and appellate court levels.¹⁷⁷

Int'l Trade Rep. (BNA) 459 (Mar. 13, 1996) (analyzing the WTO's decision).

174. Baseline Requirements for Gasoline Produced by Foreign Refiners, 62 Fed. Reg. 45,533 (1997) (EPA); *see also United States Promises WTO Changes in Reformulated Gasoline Rules*, 14 Int'l Trade Rep. (BNA) 548, 548 (Mar. 26, 1997); *Options to Meet Clean Air, WTO Goals Sought by EPA After Gas Decision Rule*, 13 Int'l Trade Rep. (BNA) 1143, 1143 (July 10, 1996).

175. All of the petitions for review discussed in the text accompanying notes 153-74 challenged the reformulated gasoline rule and were therefore distinct from petitions filed against the EPA's accompanying renewable oxygenates rule—a rule which was ultimately struck down by the D.C. Circuit. *See American Petroleum Inst. v. EPA*, 52 F.3d 1113, 1115 (D.C. Cir. 1995). The American Petroleum Institute (API) successfully argued that the agency's 30% mandate for ethanol contravened the Clean Air Act. *See id.* at 1119. The court subsequently awarded API \$237,997.03 in attorneys fees. *See American Petroleum Inst. v. EPA*, 72 F.3d 907, 910 (D.C. Cir. 1996).

176. *Cf. Harter, supra* note 21, at 489 ("Consensual rulemaking is certainly not a panacea."). A negotiated rulemaking process also failed to stop a legal proceeding against the EPA in Pennsylvania. After EPA rejected the State of Pennsylvania's water standards, Pennsylvania established a negotiated rulemaking process to develop new standards that would meet EPA's approval. However, the Raymond Proffitt Foundation, a Pennsylvania advocacy group, proceeded with a citizen suit it had filed seeking to compel the EPA to issue federal standards. A month after Pennsylvania said the reg neg process would conclude (but still before the state issued any final standards), the district court ordered EPA to set its own standards "immediately and without further delay." *Raymond Proffitt Found. v. EPA*, 930 F. Supp. 1088, 1105 (E.D. Pa. 1996).

177. *See USA Group Loan Servs., Inc. v. Riley*, 82 F.3d 708 (7th Cir. 1996) (challenging third party student loan servicer provisions); *Career College Ass'n v. Riley*, 74 F.3d 1265 (D.C. Cir. 1996) (challenging financial responsibility provisions); *Career College Ass'n v. Riley*, No. 94-1372, 1994 U.S. Dist. LEXIS 11,232 (D.D.C. Aug. 9, 1994) (challenging financial responsibility provisions); *Career College Ass'n v. Riley*, No. 94-5213, 1995 U.S. App. LEXIS 31,486 (D.C. Cir. Sep. 29, 1995) (per curiam) (challenging non-federal revenue source requirement for profit trade schools); *Career College Ass'n v. Riley*, No. 94-1214, 1994 U.S. Dist. LEXIS 10,214 (D.D.C. July 19, 1994) (challenging non-federal revenue source requirement for proprietary trade schools); *Ponce Paramedical College, Inc. v. United States Dep't of Educ.*, 858 F. Supp. 303 (D.P.R. 1994) (challeng-

In contrast to the conventional view that negotiated rulemaking has eliminated legal challenges to federal regulations,¹⁷⁸ it is plain that such challenges still arise even after an agency has used a negotiated rulemaking procedure.

Of course, the fact that groups have challenged some negotiated rules does not fully respond to the claim that a consensus-based approach reduces the frequency of litigation.¹⁷⁹ To determine whether the litigation rate for negotiated rules is notably lower than that for conventional rules, as the NPR report suggested, it is first necessary to determine the actual litigation rate for

ing eligibility provisions for proprietary schools).

178. See, e.g., John Dunlop, *The Emergence of Alternative Dispute Resolution (ADR) and Negotiated Rule-Making* 84 (Feb. 6, 1997) (unpublished book chapter on file with the *Duke Law Journal*) ("The experience in agencies that have utilized negotiations to formulate regulations is that subsequent litigation over the rules is almost eliminated.").

179. That negotiated rules engender any litigation at all is certainly surprising given the intuitive and statutory meaning of "consensus," as well as the overwhelming purpose of negotiated rulemaking found in the scholarly literature and legislative history. Interestingly, the individual most instrumental in the development of negotiated rulemaking, Philip Harter, might not be surprised that litigation has occurred over negotiated rules. Although in his seminal article Harter did speculate that "negotiations may reduce judicial challenges" to agency rules, Harter, *supra* note 12, at 102, he argued that "the prime benefit of direct negotiations is that it enables the participants to focus squarely on their respective interests," *id.* at 29. Harter accurately predicted that "[s]ome parties, of course, would seek judicial review of rules developed through a regulatory negotiation process." *Id.* at 102. Several years later, he again observed that even though he knew of no negotiated rules that had been challenged at that time, "that surely will not continue forever." Harter, *supra* note 137, at 54. More recently, though, Harter has shifted his tone in a way that contributes to the mistaken belief that negotiated rules avoid litigation. In a 1993 article he co-authored, Harter described the negotiated rulemaking process as a means of "preventing lawsuits down the road," and stated that "[t]o date . . . no rule crafted in this manner has been subjected to court action." Philip Harter & Daniel Finkelstein, *The Coke Ovens' Regulatory Negotiation: From Choking Controversy to Consensus Relief*, 2 J. ENVTL. PERMITTING 343, 345 (1993). Several years later, Harter offered a carefully crafted statement in support of negotiated rulemaking in testimony before Congress: "As further indication of the success of the process, there has *never* been a judicial challenge to a negotiated rule that was issued by the agency intact." *1996 Reauthorization Hearings*, *supra* note 81, at 69 (statement of Philip Harter on behalf of the American Bar Association). In that same congressional testimony, Harter seemed to imply that negotiated rulemaking has reduced litigation when he asserted that negotiated rules result in cost savings, despite the up-front resources they demand: "Considering the costs of litigation for both the regulated community and the government, these savings are considerable." *Id.* at 68. Of course, Harter's recent statements, even in their more careful formulation, are not accurate because outside parties have challenged negotiated rules that participants in the regulatory negotiations found acceptable. See *supra* text accompanying notes 149, 161 and *infra* note 233 and accompanying text.

conventional rules. Since the EPA has often been used as the benchmark, I use the EPA for purposes of my analysis as well.

It has been widely believed that interest groups challenge virtually every EPA regulation in court.¹⁸⁰ In arguing that judicial review has imposed undesirable costs on agency management, for example, political scientist James Q. Wilson emphasized that "[o]ver 80 percent of the three hundred or so regulations EPA issues each year wind up in the courts."¹⁸¹ Making a similar argument, Philip Howard invoked this statistic in his best-selling critique of the modern regulatory state.¹⁸² As Appendix D shows, the belief that 80 percent of EPA rules get challenged in court has woven its way into an exhaustive body of work by journalists, governmental officials, and scholars.¹⁸³

The original source of the 80 percent statistic has remained largely obscure.¹⁸⁴ The statistic, which originated in speeches given by William Ruckelshaus,¹⁸⁵ has been attributed at different

180. See KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, *ORGANIZED INTERESTS AND AMERICAN DEMOCRACY* 367 (1986) ("[V]irtually every regulation issued by such agencies as the Environmental Protection Agency and the Occupational Safety and Health Administration is challenged in court either by environmental and consumer groups or by industry.").

181. JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 284 (1989).

182. See PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* 87 (1994) ("[M]ost decisions are appealed in the courts, including 80 percent of the EPA's decisions . . .").

183. Ordinarily, it would suffice to cite a few sources here to illustrate that others have stated that 80 percent of EPA's regulations end up in court. Yet doing so would fail to convey the full extent to which the belief in an 80% litigation rate has permeated the literature. The pervasiveness of this belief—and its persistence over time—can hardly be overstated. Accordingly, Appendix D provides a bibliography of many, but by no means all, of the sources which advance the claim that outside groups challenge the overwhelming majority of EPA regulations. Additional references to the 80% litigation rate can be found throughout the legislative history of the Negotiated Rulemaking Act. See *supra* notes 45, 48, 49, 54 and accompanying text.

184. See KERWIN, *supra* note 18, at 120 n.55 ("The origins of this statistic are obscure, but it has been quoted extensively in EPA training manuals.").

185. See William D. Ruckelshaus, *Environmental Protection: A Brief History of the Environmental Movement in America and the Implications Abroad*, 15 ENVTL. L. 455, 463 (1984-85) ("Eighty percent of what the agency does is finally decided either in a negotiated or formal court decision."); William D. Ruckelshaus, *Environmental Risks and Liabilities—Identification, Assessment and Management*, 24 Hous. L. Rev. 11, 19 (1987) ("[E]ighty percent" of EPA's "decisions, rules, regulations, and judgments" end up in court). More recently Ruckelshaus noted:

As is well known, nearly every major EPA decision ends up in the judicial system The result has been that most of the environmental protections that are actually (rather than theoretically) put into place are the result not of

times to at least two other EPA administrators: Lee Thomas¹⁸⁶ and William Reilly.¹⁸⁷ Part of the ambiguity of the 80 percent statistic stems from confusion about precisely what it means. In some accounts the 80 percent figure purports to be the litigation rate for all EPA "decisions;"¹⁸⁸ in others it is the rate for all EPA "rules" or "regulations;"¹⁸⁹ and in still others it represents the litigation rate for all "nonroutine" or "major" rules.¹⁹⁰ Sometimes the 80 percent rate has even been inflated to 85 percent.¹⁹¹

Amazingly, no EPA analyses underlay the origin of this statistic, even though it has taken on a life of its own.¹⁹² In order to

the deliberations of scientists or engineers or elected representatives or responsible appointed officials, but of consent decrees handed down by judges.

William D. Ruckelshaus, *Stopping the Pendulum*, ENVTL. F., Nov.-Dec. 1995, at 25, 27.

186. Thomas, *supra* note 29, at 3 ("We found that over three-quarters of our regulations once promulgated were litigated."); *see also* Miller, *supra* note 29, at 20 (quoting Thomas that "[f]ully 80% of the rules EPA issues are challenged.")

187. *See, e.g.*, ROSEMARY O'LEARY, ENVIRONMENTAL CHANGE: FEDERAL COURTS AND THE EPA 17 (1993) ("Reilly once estimated that 80 percent of his decisions were appealed to the courts."); Jeffrey M. Berry, *Citizen Groups and the Changing Nature of Interest Group Politics in America*, 528 ANNALS AM. ACAD. OF POL. & SOC. SCI. 30, 38 (1993) (quoting Reilly that four out of five decisions he makes end up in court); Wald, *supra* note 146, at A1 (quoting Reilly as stating that "[f]our of every five decisions I make are contested in court.").

188. *See* Douglas J. Amy, *Environmental Dispute Resolution: The Promise and the Pitfalls*, in ENVIRONMENTAL POLICY IN THE 1990S 211, 216 (Norman J. Vig & Michael E. Kraft eds., 1990) ("80 percent of environmental regulatory decisions are appealed in court."); GEORGE HOBERG, PLURALISM BY DESIGN: ENVIRONMENTAL POLICY AND THE AMERICAN REGULATORY STATE 199 (1992) ("[F]ully 80 percent of EPA's final decisions are the subject of judicial appeal").

189. *See, e.g.*, KERWIN, *supra* note 18, at 116 ("The Environmental Protection Agency has estimated that some 80 percent of its rules stimulate lawsuits by dissatisfied parties."); Robert Glicksman & Christopher H. Schroeder, *EPA and the Courts: Twenty Years of Law and Politics*, LAW & CONTEMP. PROBS., Autumn 1991, at 249, 249 n.2 ("[O]ver 80% of EPA's regulations are challenged in court.").

190. *See, e.g.*, Patricia M. Wald, *Regulation at Risk: Are Courts Part of the Solution or Most of the Problem*, 67 S. CAL. L. REV. 621, 624 (1994) ("Eighty percent of all major Environmental Protection Agency ('EPA') rules are litigated in court."); Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, LAW & CONTEMP. PROBS., Autumn 1991, at 311, 324 (stating that EPA "has had 80 to 85 percent of its major regulations challenged in court.").

191. *See, e.g.*, KERWIN, *supra* note 18, at 264 ("The Office of General Counsel at the Environmental Protection Agency estimates that 85 percent of the hundreds of nonroutine rules issued by the EPA each year are challenged in court."); COUNCIL ON ENVTL. QUALITY, ENVIRONMENTAL QUALITY: THE SIXTEENTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 3 (1985) ("Fully 85 percent of EPA's regulations result in litigation."); WILLIAM GREIDER, WHO WILL TELL THE PEOPLE: THE BETRAYAL OF AMERICAN DEMOCRACY 110 (quoting William Ruckelshaus that "85 percent of the decisions made by the EPA administrator that are appealable were appealed").

192. Interviews with EPA staff members who served under Administrator Ruckelshaus

test the validity of the statistic, I collected data from the EPA's litigation docket as well as from the dockets at the U.S. Court of Appeals for the District of Columbia Circuit.¹⁹³ The EPA dockets included litigation filed against the agency in any federal court during 1987-1991. During this time, the EPA issued 1568 rules and was named as a defendant in 411 cases in the U.S. Courts of Appeals, where rule challenges must be filed.¹⁹⁴ The major environmental statutes typically require that petitions for judicial review be filed within a few months after the EPA promulgates a rule,¹⁹⁵ so most petitions for review of a rule are filed in the year when the rule is published. Some small portion of suits are not filed in the same year as the rule, but aggregating the entire five-year period minimizes any error due to such a time lag.

The litigation rate for rules issued during the 1987-1991 period covered by the EPA docket, even conservatively calculated, turned out to be much lower than widely believed: only 26 percent of rules issued were challenged. In calculating this rate, I have used what I take to be the most realistic estimate for EPA rules. I have relied on a computer search of the *Federal Register* which specifically excluded those rules that were minor corrections, technical amendments, or clarifications of other rules.¹⁹⁶ When

confirmed that no systematic analysis underlay this claim. Rather, it was based on a ballpark estimate of the number of rules published in the agency's regulatory agenda and a similar estimate of the number of petitions for review handled by the Office of General Counsel. To ensure candor, I conducted all interviews on a not-for-attribution basis.

193. A fuller description of my research methods is contained in Cary Coglianese, *Challenging the Rules: Litigation and Bargaining in the Administrative Process* 198-221 (1996) (unpublished manuscript, on file with author).

194. See, e.g., Clean Air Act, 42 U.S.C. § 7607(b) (1994); Clean Water Act, 33 U.S.C. § 1369(b) (1994); Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9613(a) (1994); Resource Conservation and Recovery Act, 42 U.S.C. § 6976 (1994); Safe Drinking Water Act, 42 U.S.C. § 300j-7(a) (1994); Toxic Substances Control Act, 15 U.S.C. § 2618(a) (1994).

195. See Clean Air Act, 42 U.S.C. § 7607(b) (1994) (60 day period); Clean Water Act, 33 U.S.C. § 1369(b)(1) (1994) (120 day period); Resource Conservation and Recovery Act, 42 U.S.C. § 6976(a)(1) (1994) (90 day period); Safe Drinking Water Act, 42 U.S.C. § 300j-7 (1994) (45 day period); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1276(a)(1) (1994) (60 day period); Toxic Substances Control Act, 15 U.S.C. § 2618(a)(1) (1994) (60 day period).

196. My most restrictive search of the Fedreg file in LEXIS, which excluded corrections and technical amendments, yielded 1568 rules for the years 1987-1991. In comparison, my broadest LEXIS search, which retrieved all final actions which could be challenged in court, yielded 1964 rules (a litigation rate of 20.9%). Although corrections or technical amendments could be independently challenged, these were excluded because

other available estimates of the total number of EPA rules were used, the litigation rate dropped even lower. For instance, using Office of Management and Budget (OMB) data on the number of final EPA rules promulgated during the same time period, the litigation rate amounted to only 19 percent—precisely the opposite of the rate widely assumed.¹⁹⁷

As is sometimes acknowledged, the 80 percent figure was not originally intended to describe the rate at which all EPA rules were litigated, but only those rules significant enough to be published in the EPA's semiannual *Regulatory Agenda*.¹⁹⁸ Since the rules appearing in the *Regulatory Agenda* are by definition more significant,¹⁹⁹ the litigation rate can be expected to be higher than that for all EPA rules. Unfortunately, the EPA docket data do not permit one to distinguish between suits involving those rules that are listed in the *Regulatory Agenda* and those that are not. Therefore I used court records from the D.C. Circuit to de-

any such challenge would likely be consolidated with a challenge to the rule being corrected or amended. In addition to their relative lack of independent policy importance, corrections and technical amendments are usually actions that resolve problems outside groups have brought to the agency's attention and thus are unlikely to be challenged in the first place.

197. Adding together the data reported annually in Exhibit 19 to Appendix IV of the OMB's annual *Regulatory Program of the United States*, EPA issued 2162 rules during this period. In addition, a search of another leading electronic source of *Federal Register* documents, the Legi-Slate database, revealed a total of 2212 final rules (for a rate of 18.6 percent). Thus, my restrictive LEXIS search yields the least number of rules and the highest litigation rate.

198. See *supra* note 192.

199. Listings in the *Regulatory Agenda* include rules that have an annual economic impact of \$100 million or more or are considered economically significant. See Exec. Order No. 12,291, 46 Fed. Reg. 13,193, 13,193, 13,196-97 (1981) (revoked by Exec. Order No. 12,866, 3 C.F.R. 638 (1994), reprinted in 5 U.S.C. § 601 (1994) (not significantly altering economic impact guidelines)). They also include rules that are otherwise considered "significant" by the agencies. For the EPA, "significant" rules are those expected to have important economic or environmental impacts, or to present difficult administrative tasks for the agency. See Thomas O. McGarity, *The Internal Structure of EPA Rulemaking*, LAW & CONTEMP. PROBS., Autumn 1991, at 57, 72 n.44. The definition of "significant regulatory action" includes actions that have an economic impact of \$100 million or more or adversely affect the economy in a material way. See Exec. Order No. 12,866, 3 C.F.R. 638, 638 (1994). The only rules excluded are: "[s]pecialized categories of action (such as EPA approvals of state plans and other actions that do not apply nationally) [and] routine actions (such as pesticide tolerances and minor amendments to existing regulations)." *Regulatory Agenda*, 47 Fed. Reg. 15,702, 15,702 (1982). EPA managers do not consider using negotiated rulemaking for such minor or routine rules, but instead they select among the kinds of significant rules that would be listed in the regulatory agenda, the more appropriate comparison group for negotiated rules.

termine the rate of litigation for significant EPA regulations promulgated under two major statutes, the Resource Conservation and Recovery Act (RCRA) and the Clean Air Act, for the period 1980-1991.²⁰⁰ Any suits challenging significant, national rules under these statutes must be filed in the United States Court of Appeals for the District of Columbia Circuit.²⁰¹ A total of 220 nationally-applicable significant RCRA and Clean Air Act rules were completed from 1980 to 1991. Of these, petitions for review were filed against 77, yielding an aggregate litigation rate of 35 percent. As Table 4 shows, Clean Air Act regulations were challenged less frequently (31%) than RCRA rules (43%) over this time period.

Table 4. Litigation of Significant Clean Air Act and Resource Conservation and Recovery Act Rules, 1980-1991

	CAA	RCRA	Total
Rules	141	79	220
Challenges	43	34	77
Litigation Rate	31%	43%	35%

Note: The "Rules" row lists the totals of all nationally-applicable rules that the EPA considered significant enough to merit listing in its semi-annual regulatory agendas. These totals include those rules classified as "major" under Executive Order 12,291 as well as other non-minor and non-routine rules. The "Challenges" row lists the subset of rules over which one or more affected parties filed a petition for review in the United States Court of Appeals for the D.C. Circuit. Since not all petitions for review reach an appellate panel for a decision which can be reported, data on filings were obtained from the docket records at the D.C. Circuit.

Although conventional wisdom and the legislative history of the Negotiated Rulemaking Act suggest that only a minority of EPA rules escape litigation, a closer look at the available data

200. Even though my sample includes rules issued under only two of EPA's dozen or so statutes, these rules made up about a third of all significant EPA rules published during the same time period.

201. See Resource Conservation and Recovery Act (RCRA) of 1976, 42 U.S.C. § 6976(a)(1) (1994); Clean Air Act, 42 U.S.C. § 7607(b)(1) (1994).

indicates that the prevailing view has things backwards. The majority of EPA rules escape litigation, with petitions for review filed for at most about a quarter of them. The litigation rate for significant rules under two major statutes is somewhat higher—35 percent—but still well under the 80 percent rate that scholars have previously cited. More than previously thought, litigation over EPA rules occurs selectively, if not infrequently.²⁰²

How does EPA's track record for negotiated rules compare with its track record for rules overall? The National Performance Review's 20 percent litigation rate was based on an incomplete review of the first ten negotiated rulemakings finalized by EPA.²⁰³ However, when all twelve of these rules are included, and when a more complete search of court records is made, the actual litigation rate is much higher. On the basis of my review of records at the D.C. Circuit Court of Appeals, at least *six* of EPA's *twelve* finalized rules developed using negotiated rulemaking have been subject to petitions for judicial review filed in federal court.²⁰⁴ The challenged regulations include those addressing: 1)

202. The findings I report here are consistent with those of other empirical studies of litigation and the regulatory process. Christine Harrington reports aggregate data on administrative appeals showing that "[t]he pace of regulatory litigation has not increased sharply in the last fifteen years nor has judicial support for agency rules weakened." Harrington, *supra* note 21, at 305. In their study of nearly 700 EPA rules issued under RCRA, James Hamilton and Christopher Schroeder found that only 21.8% of the rules had been subject to a court remand or consent decree. See James T. Hamilton & Christopher H. Schroeder, *Strategic Regulators and the Choice of Rulemaking Procedures: The Selection of Formal vs. Informal Rules in Regulating Hazardous Waste*, LAW & CONTEMP. PROBS., Spring 1994, at 111, 153.

203. See IMPROVING REGULATORY SYSTEMS, *supra* note 3, at 32 n.7.

204. Of the other six rules for which I found no evidence of ensuing legal actions, four were issued under the Clean Air Act and the Resource Conservation and Recovery Act. Both statutes require any challenges to nationally-applicable rules to be filed in the D.C. Circuit Court within a defined time period following the publication of the final rule. See *supra* notes 194-95 and accompanying text. The remaining two rules were issued under the authority of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), which vests review of rulemakings in the district courts and does not impose a time limitation on the filing of a petition for review. See 7 U.S.C. § 136n(a) (1994). For these rules, I conducted searches in case reports, relevant looseleaf services, and the docket of the District Court for the District of Columbia. Furthermore, I contacted lawyers who might have filed such cases or have known of such filings. I found no evidence that either of these FIFRA rules had yet been the subject of a petition for judicial review. That said, one of these rulemakings, the worker protection standard, has been a subject of considerable controversy since its promulgation. EPA issued a final rule after a failed attempt to achieve full consensus among all the parties to the original negotiated rulemaking committee. See 57 Fed. Reg. 38,102 (1992). That final rule has been met with congressional and presidential intervention, threats of litigation, and numerous agency

asbestos in school buildings;²⁰⁵ 2) the underground injection of hazardous wastes;²⁰⁶ 3) reformulated fuels;²⁰⁷ 4) chemical equipment emissions leaks;²⁰⁸ 5) wood furniture coatings;²⁰⁹ and 6) the collection of information on disinfectant byproducts.²¹⁰

I have already discussed the judicial challenges filed against the EPA's reformulated gasoline rule, challenges which involved both participants in the negotiated rulemaking process, such as the American Petroleum Institute, as well as outsiders like the National Tank Truck Carriers.²¹¹ The additional challenged reg negs show that a similar set of actors filed petitions for review. Many petitioners have been participants in the negotiated rulemaking proceedings. However, sometimes the petitioners were not members of the rulemaking committee, as with the Grand Canyon visibility rule and reformulated gasoline rule. One additional rule—the wood furniture coating regulation—drew petitions from trade associations that were not represented on the negotiated rulemaking committee.²¹² A brief review of these additional challenges demonstrates the range of petitions filed over negotiated rules.

• *Asbestos in School Buildings.* The EPA used negotiated rulemaking to establish methods for public schools to follow in identifying and mitigating asbestos exposure.²¹³ After the EPA

revisions and proposed revisions. See *supra* note 111.

205. See *Safe Bldgs. Alliance v. EPA*, 846 F.2d 79, 80–81 (D.C. Cir. 1988).

206. See *Natural Resources Defense Council v. EPA*, 907 F.2d 1146, 1149 (D.C. Cir. 1990).

207. See *National Tank Truck Carriers, Inc. v. EPA*, No. 94–1323 (D.C. Cir. filed Apr. 18, 1994); *Amerada Hess Corp. v. EPA*, No. 94–1319 (D.C. Cir. filed Apr. 15, 1994); *Fina Oil & Chem. Co., Inc. v. EPA*, No. 94–1142 (D.C. Cir. filed Feb. 25, 1994); *Texaco, Inc. v. EPA*, No. 94–1143 (D.C. Cir. filed Feb. 25, 1994); *American Petroleum Inst. v. EPA*, No. 94–1138 (D.C. Cir. filed Feb. 24, 1994) (D.C. Cir. voluntary dismissal granted Feb. 23, 1996).

208. See *Dow Chem. Co. v. EPA*, No. 94–1465 (D.C. Cir. filed June 21, 1994); *Chemical Mfrs. Ass'n v. EPA*, No. 94–1463 (D.C. Cir. filed June 21, 1994).

209. See *Halogenated Solvents Indus. Alliance, Inc. v. EPA*, No. 96–1036 (D.C. Cir. filed Feb. 5, 1996); *Society of Plastics Indus., Inc. v. EPA*, No. 96–1038 (D.C. Cir. filed Feb. 5, 1996); *Chemical Mfrs. Ass'n v. EPA*, No. 96–1031 (D.C. Cir. filed Feb. 2, 1996).

210. See *American Water Works Ass'n v. EPA*, No. 96–1208 (D.C. Cir. filed June 21, 1996).

211. See *supra* notes 153–66 and accompanying text.

212. See *infra* notes 231–34 and accompanying text.

213. See *Asbestos-Containing Materials in Schools*, 52 Fed. Reg. 41,826 (1987) (codified at 40 C.F.R. pt. 763) (EPA) [hereinafter *Asbestos-Containing Materials in Schools*].

promulgated its final rule, the Safe Buildings Alliance (an asbestos industry trade association), two building products manufacturers, and two individuals filed petitions for review.²¹⁴ A third building products company, GAF Corporation, intervened in the case, as did the American Association of School Administrators and various state attorneys general.²¹⁵ Although the Safe Buildings Alliance had signed the limited consensus statement which concluded the negotiated rulemaking,²¹⁶ the industry nevertheless challenged the rationality of EPA's action, specifically objecting to its failure to define a safe level of asbestos exposure and arguing that its decision to allow the removal of asbestos would raise the level of asbestos fibers in the air.²¹⁷ The arguments were briefed and presented to a panel of the D.C. Circuit Court, which in the end upheld the rule against all the challenges.²¹⁸

• *Underground Injection of Hazardous Wastes.* The EPA's underground injection rule established standards for the use of underground methods for disposing of and storing hazardous wastes.²¹⁹ After EPA completed the rulemaking, five petitions were filed by interests represented in the negotiated rulemaking, including the waste treatment industry, the chemical industry, and an environmental group.²²⁰ These petitions were consolidated and three major trade associations—the American Petroleum Institute, the American Iron and Steel Institute, and the Institute for Chemical Waste Management—intervened in the case.²²¹

The chemical industry challenged the rule's permitting process, its application of the statute's "no migration" standard, and the agency definition of "no migration," which included even the migration of hazardous constituents of hazardous wastes.²²² The

214. See *Safe Bldgs. Alliance v. EPA*, 846 F.2d 79, 79 (D.C. Cir. 1988).

215. See *id.*

216. See *Participants and Facilitators Discuss Negotiation of EPA's Proposed Rule on Asbestos in Schools*, 1 Alternative Disp. Resol. Rep. (BNA) 154, 157 (July 23, 1987).

217. See *Safe Bldgs. Alliance*, 846 F.2d at 83, 84.

218. See *id.* at 80, 85.

219. See *Underground Injection Control Program: Hazardous Waste Disposal Injection Restrictions*, 53 Fed. Reg. 28,118, 28,118 (1988) (codified at 40 C.F.R. pts. 124, 144, 146, 148) (EPA).

220. See *Natural Resources Defense Council v. EPA*, 907 F.2d 1146, 1146 (D.C. Cir. 1990).

221. See *id.*

222. See *id.* at 1153-58.

Natural Resources Defense Council and the Hazardous Waste Treatment Council also challenged the EPA's application of the "no migration" standard, arguing that it should apply to the seepage of hazardous constituents from otherwise non-hazardous waste.²²³ Petitioners also challenged the rule's definition of "injection zone" and its standards for injection into salt domes, underground mines, and caves.²²⁴ A panel of the D.C. Circuit upheld the rule against all but one of the challenges, remanding the standards for salt domes, mines, and caves for a finding that these standards satisfied the statutory requirements.²²⁵

• *Chemical Equipment Leaks.* The equipment leaks rule was designed to control releases of hazardous emissions from valves, flanges, and other connecting points in chemical manufacturing facilities.²²⁶ Through a series of negotiation sessions, the participating chemical companies and environmental groups reached an agreement on procedures for monitoring leaks. Before the agency could promulgate the rule, Congress passed amendments to the Clean Air Act and the EPA incorporated the negotiated agreement into a broader set of national emissions standards for hazardous air pollutants (NESHAP) generated by the chemical industry. The final rule, known as the Hazardous Organic NESHAP, or HON rule for short, regulated releases from heat exchange systems, wastewater streams, process vents, and storage vessels, as well as from equipment leaks.²²⁷ The equipment leaks portion of the rule remained largely as the negotiated rulemaking committee had agreed.

Following the promulgation of the final rule, the Chemical Manufacturers Association and Dow Chemical Company, both of whom were represented in the negotiated rulemaking, filed petitions for review challenging numerous aspects of the HON rule.²²⁸ Although most of their objections were leveled at aspects

223. See *id.* at 1152, 1159-62.

224. See *id.* at 1162-65.

225. See *id.* at 1165-66.

226. See National Emission Standards for Organic Hazardous Air Pollutants, 59 Fed. Reg. 19,402 (1994) (codified at 40 C.F.R. pt. 80) (EPA) [hereinafter HON Rule].

227. See *id.*

228. See *Chemical Mfrs. Ass'n v. EPA*, No. 94-1463 (D.C. Cir. filed June 21, 1994); *Dow Chem. Co. v. EPA*, No. 94-1465 (D.C. Cir. filed June 21, 1994). These cases were consolidated by order of the court on Oct. 24, 1994. The American Forest & Paper Association, a trade association from outside the chemical industry and not a member of

of the rule which were not subject to the negotiated rulemaking, they also raised concerns about certain parts of subpart H, the equipment leaks portion of the final rule. The petitioners and the EPA entered settlement discussions within a few months and eventually reached an agreement on dozens of changes to the final rule.²²⁹ The agency subsequently promulgated revisions to subpart H of the rule, including changes to the control options for leaks from compressors, an issue that had been overlooked by the chemical industry during the negotiations.²³⁰

• *Wood Furniture Coatings.* Like the HON rule, the wood furniture coatings rule established national emissions standards for hazardous air pollutants.²³¹ The negotiated rulemaking process brought together representatives from the wood furniture industry, suppliers of wood coatings, and environmental groups. During these negotiations, environmental representatives expressed concern that the furniture industry might substitute other potentially hazardous chemicals not specifically covered under the rule. The parties subsequently agreed to incorporate into the rule a list of other chemicals (not currently used by the wood coatings industry) labeled as "of potential concern."²³² After EPA promulgated the final rule, three chemical industry trade associations not represented in the negotiations filed petitions for review challenging the listing of additional chemicals as "of potential concern."²³³ As of November, 1996, the EPA was engaged in settlement discussions with the Chemical Manufacturers Association, the Halogenated Solvents Industry Alliance, and the Society of Plastics Industry over this issue.²³⁴

the negotiated rulemaking committee, intervened in this litigation. See Clerk's Order Granting Non-Party Motion to Intervene, *Chemical Mfrs. Ass'n v. EPA*, No. 94-1463 (D.C. Cir. filed July 29, 1994).

229. See Settlement Agreement, *Chemical Mfrs. Ass'n v. EPA*, No. 94-1463 (D.C. Cir. Aug. 30, 1996).

230. See Proposed HON Rule Clarifications, 61 Fed. Reg. 43,698 (1996) (to be codified at 40 C.F.R. pt. 63) (proposed Aug. 26, 1996) (EPA) [hereinafter Proposed HON Rule Clarifications]; Final HON Rule Clarifications, 62 Fed. Reg. 2722 (1997) (to be codified at 40 C.F.R. pt. 63) (EPA) [hereinafter Final HON Rule Clarifications].

231. See Wood Furniture Manufacturing Regulations, 60 Fed. Reg. 62,930 (1995) (codified at 40 C.F.R. pts. 9, 63) (EPA).

232. See *id.* at 62,951 tbl.6.

233. See *Halogenated Solvents Indus. Alliance v. EPA*, No. 96-1036 (D.C. Cir. filed Feb. 5, 1996); *Society of Plastics Indus., Inc. v. EPA*, No. 96-1038 (D.C. Cir. filed Feb. 5, 1996); *Chemical Mfrs. Ass'n v. EPA*, No. 96-1031 (D.C. Cir. filed Feb. 2, 1996).

234. See Joint Status Report at 2, *Chemical Mfrs. Ass'n v. EPA*, No. 96-1031 (D.C.

• *Disinfectant Byproducts.* The most recently challenged regulation established monitoring requirements that allow the EPA to collect data on drinking water quality. To control microbial contamination, water suppliers treat drinking water with disinfectants. Responding to concerns about the chemical byproducts created when disinfectants react with chemicals already in the water, the EPA convened a negotiated rulemaking proceeding to develop enhanced standards for microbials and new standards for disinfectant byproducts. The negotiations resulted in two proposed rules on disinfectant byproducts and water treatment,²³⁵ and a final rule governing the collection of information the agency needs before finalizing the two proposed rules.²³⁶

Following EPA's promulgation of the information collection rule, the American Water Works Association (AWWA), a member of the rulemaking committee, reported that it "was surprised and disappointed by some significant provisions of the regulation."²³⁷ AWWA argued that the EPA established a statistically unreliable monitoring procedure in its final rule which was not included in the proposed rule.²³⁸ Faced with a limited statutory deadline for filing a petition for judicial review,²³⁹ AWWA filed a petition in the D.C. Circuit Court challenging the information collection rule.²⁴⁰ AWWA objected to the time period for water suppliers to complete the required monitoring, as well as to the specific monitoring tests required under the final rule.²⁴¹

Cir. Nov. 27, 1996).

235. See Enhanced Surface Water Treatment Requirements, 59 Fed. Reg. 38,832 (1994) (to be codified at 40 C.F.R. pts. 141 & 142) (proposed July 29, 1994); Disinfections and Disinfection Byproducts, 59 Fed. Reg. 38,668 (1994) (to be codified at 40 C.F.R. pts. 141 & 142) (proposed July 29, 1994).

236. See Drinking Water Information Collection Rule, 61 Fed. Reg. 24,354 (1996) (codified at 40 C.F.R. pt. 141).

237. *Future Uncertain for Negotiation Process on Microbials, Disinfection Byproducts, EPA Says*, 27 Env't Rep. (BNA) 1194, 1195 (Sept. 27, 1996) (quoting a letter from AWWA).

238. See *id.* at 1194.

239. The Safe Drinking Water Act requires any petitions for review to be made within 45 days of promulgation of the challenged rule. See 42 U.S.C. § 300j-7(a)(2) (1994).

240. See *American Water Works Ass'n v. EPA*, No. 96-1208 (D.C. Cir. filed Nov. 6, 1996).

241. See Petitioner's Statement of Issues at 1, *American Water Works Ass'n v. EPA*, No. 96-1208 (D.C. Cir. July 24, 1996).

After several months of discussions with the EPA, AWWA decided to withdraw its petition. AWWA reported that some of the issues related to the compliance schedule had been resolved, and that the EPA was inclined to consider its concerns about the testing procedure.²⁴² Following the filing of AWWA's petition, for example, EPA's Science Advisory Board's Drinking Water Committee met to examine the reliability of the new monitoring requirements imposed by the agency.²⁴³ Given the ongoing nature of the EPA's actions on microbials and disinfectant byproducts, AWWA decided to pursue its "fundamental disagreement" with the EPA outside of court and in the context of ongoing discussions with the agency and other organizations over the final substantive standards.²⁴⁴ These ongoing discussions with participants in the negotiated rulemaking have sometimes engendered disagreement over what the parties actually agreed to in their negotiations over the substantive drinking water standards.²⁴⁵

As this review of the several challenged EPA rules demonstrates, negotiated rules are vulnerable to a variety of legal objections. Participants file judicial petitions when they believe the final rule is inconsistent with the negotiated agreement or when it contains adverse provisions not addressed by the negotiation. Nonparticipants also file petitions when a final rule adversely affects their interests. In each of these examples, petitioners challenged EPA rules notwithstanding the fact that the rules had been developed using the negotiated rulemaking process.²⁴⁶

242. See Motion for Voluntary Dismissal of Petition for Review at 1, *American Water Works Ass'n v. EPA*, No. 96-1208 (D.C. Cir. Nov. 6, 1996); *Water Utility Organization Withdraws Suit on EPA Information Collection Rule*, 27 Env't Rep. (BNA) 1465 (Nov. 15, 1996) [hereinafter *AWWA Withdraws Suit*].

243. See Meeting Notice, 61 Fed. Reg. 33,917 (1996) (EPA).

244. See *AWWA Withdraws Suit*, *supra* note 242, at 1465. AWWA acted as many parties have in filing so-called "protective petitions" against EPA rules. Given the jurisdictional deadlines for filing petitions for review under statutes such as the Safe Drinking Water Act, organizations concerned about the content of a final rule often file a petition just to ensure their right to proceed further if ongoing discussions with agency staff prove unproductive. See Coglianese, *supra* note 21, at 761-62 (discussing the filing of "protective petitions").

245. See *Water Organization Recommends That EPA Proceed With Rules On Microbials, Byproducts*, 27 Env't Rep. (BNA) 1576 (Nov. 29, 1996) (reporting Natural Resource Defense Council's concerns that AWWA had retreated from its agreement on maximum contaminant levels in the disinfectant byproducts proposal).

246. Some might mistakenly interpose that the petitioners in the reformulated gasoline

Although only two of the six challenged rules reached an appellate panel for a decision, this relatively small number of adjudicated cases is typical of the overall pattern of judicial review challenges. For all challenges to EPA rules filed in the D.C. Circuit between 1979–1990, only 29% were resolved through adjudication before an appellate panel.²⁴⁷ Negotiation and settlement discussions typically follow the filing of challenges to any EPA rule, making the process of litigation over regulations compatible with ongoing cooperation between representatives of litigating organizations and EPA staff.²⁴⁸ In the aggregate, negotiated rulemaking has not generated any substantial difference in the way that legal challenges get resolved.²⁴⁹

case only challenged the separate renewable oxygenates rule, and, similarly, that the petitioners in the chemical equipment leaks case only challenged unrelated portions of the HON rule into which the equipment leaks reg neg was merged. Cf. 1995 SOURCEBOOK, *supra* note 30, at 391 (suggesting that the final rule that was challenged in court differed from the negotiated rule); KERWIN & LANGBEIN, *supra* note 89, at 34 (“The rule containing the results of the clean fuels reg neg was also challenged but the issues in question were not among those negotiated by the committee.”). It is true that the renewable oxygenates rule was challenged and reversed by the D.C. Circuit. See *American Petroleum Inst. v. EPA*, 52 F.3d 1113, 1120–21 (D.C. Cir. 1995). It is also true that the petitioners in the equipment leaks case raised numerous challenges to subparts F, G, and I of the HON rule, which did not pertain to equipment leaks. See *Proposed HON Rule Clarifications*, *supra* note 230, at 43,698. However, in both instances, petitioners also challenged the very rules or portions of rules which EPA did develop using negotiated rulemaking. In the reformulated gasoline case, one should not confuse the legal challenge to the renewable oxygenates rule with the several distinct petitions filed challenging the reformulated gasoline rule which I have described in the text. See *supra* notes 153–66 and accompanying text. In the challenge to the HON rule, the petitioners raised numerous objections to subpart H which pertains to equipment leaks. See Attachment A to Settlement Agreement at 102–22, *Chemical Mfrs. Ass’n v. EPA*, No. 94–1463 (D.C. Cir. Aug. 30, 1996). These objections led EPA to amend the equipment leaks portion of the rule in order, among other things, to clarify definitions, allow the use of additional calibration gases, and change the control options for pumps and compressors. See *Proposed HON Rule Clarifications*, *supra* note 230, at 43,698, 43,709; *Final HON Rule Clarifications*, *supra* note 230, at 2786–92. An EPA official involved in the equipment leaks reg neg reported to me in a background interview that he knew during the negotiations that the chemical industry was overlooking issues related to the compressors, an oversight that the industry subsequently sought to correct in the context of its judicial challenge.

247. During the period 1979–1990, 969 petitions for review challenging EPA rules were filed in the D.C. Circuit. These were consolidated into 322 cases, of which 93 (29%) were resolved through adjudication, 47 (15%) were summarily dismissed by the court prior to any briefing or argument, 152 (47%) were voluntarily dismissed by the parties, and 29 (9%) were either pending or their outcomes could not be determined due to missing court records. See Coglianese, *supra* note 193, at 136.

248. See Coglianese, *supra* note 21, at 754.

249. Although only two challenges to EPA’s negotiated rules have been resolved through a decision by a judicial panel, between these cases there is no evidence that

For years, proponents of negotiated rulemaking have touted it as the solution to a perceived problem of excessive litigation challenging federal regulations. Yet the prevailing perception of this problem has been overdrawn. The actual level of litigation over EPA rules is dramatically lower than has been widely believed, and litigation itself often provides a forum for continued negotiation in the rulemaking process. Just as the extent of the supposed problem of litigation has been overstated, so too has the effectiveness of negotiated rulemaking as a means of reducing litigation over federal regulations. The experience so far has been that legal challenges persist, and at a noticeably higher rate at the EPA, even after the agency has employed the negotiated rulemaking procedure.²⁵⁰ As a means of reducing litigation, negotiated rulemaking has yet to show any demonstrable success.

III. ASSESSING CONSENSUS-BASED RULEMAKING

If negotiated rulemaking were living up to the theoretical advantages others have attributed to it—that is, if it really saved agencies substantial time and avoided litigation—overworked agency officials might well be expected to use it extensively. Yet even though the number of negotiated rulemakings has increased somewhat in the past few years, the practice remains confined to the tiniest fraction of all federal regulations.²⁵¹ In light of the outcomes negotiated rulemaking has achieved in terms of its two main goals, such infrequent reliance on negotiated rulemaking would seem to make sense. Negotiated rulemaking saves no appreciable amount of time nor reduces the rate of litigation. In fact, at

negotiated rulemaking made the EPA rule more likely to be upheld. One decision remanded the rule to the EPA, giving petitioners some relief. *See* *Natural Resources Defense Council v. EPA*, 907 F.2d 1146 (D.C. Cir. 1990). The other upheld the EPA rule entirely. *See* *Safe Bldgs. Alliance v. EPA*, 846 F.2d 79 (D.C. Cir. 1988). This 50 percent “approval” rate for adjudicated challenges to negotiated rules mirrors the results of adjudicated challenges more generally. Of the 93 adjudicated EPA cases filed in the D.C. Circuit from 1979 to 1990, 51 percent affirmed the rule entirely, while 49 percent granted the petitioners some relief on at least one issue (as in the underground injection case). *See* Coglianese, *supra* note 193, at 167; *see also* Wald, *supra* note 190, at 636–39 (reporting that the agency rule is upheld entirely in over 50 percent of the rulemaking reviews decided by the D.C. Circuit).

250. Even if the three pending EPA reg negs managed to escape judicial challenges, the litigation rate for negotiated rulemakings at the agency would still not be any lower than that for significant EPA rules overall.

251. *See supra* text accompanying note 101.

the EPA, negotiated rulemaking most likely demands a greater total amount of time and has resulted in a higher rate of legal filings than would otherwise be expected.

Given the extensive support negotiated rulemaking has garnered in the Congress, White House, and legal community, these findings will undoubtedly seem surprising. Although the results reported here do challenge conventional wisdom, they are not derived from any unconventional research methods. In assessing the impact of negotiated rulemaking, I have simply sought to assess the claims that negotiated rules will reduce time and litigation when compared with rules developed through informal rulemaking. Like those who have claimed to demonstrate the success of negotiated rulemaking, I have compared its outcomes with those of conventional rulemaking.²⁵² The main difference between my research and past research is that past research has generally been based on partial data and unsubstantiated beliefs about prevailing litigation rates. The surprising results reported here have resulted from a much more comprehensive effort to document the outcomes of both negotiated rulemakings and informal rulemakings.

The implications my findings hold for the future use of negotiated rulemaking may seem obvious. Before addressing them, however, I want to address criticisms which might be made of this comparative analysis. In the following section, I discuss the potential limitations inherent in any analysis of the impact of a policy or procedural intervention. I show why in this case we can be reasonably assured that any such limitations tend to exaggerate negotiated rulemaking's success in reducing time and litigation—not its failure. The findings from my analysis are telling, I

252. See, e.g., IMPROVING REGULATORY SYSTEMS, *supra* note 3, at 32 n.7 (purporting to compare the litigation rate for negotiated rules with the litigation rate for all EPA rules). In response to an earlier version of this Article, Edward Weber argued that a focus on the percentage of rules that groups challenge is too limited. My analysis would be stronger, he suggested, if I "investigated the *number* of lawsuits filed for each rule, rather than the frequency with which lawsuits are filed against individual rules." Weber, *supra* note 150, at 325-26 n.219. Such an investigation does indeed strengthen my analysis. Among those challenges to EPA rules filed in the D.C. Circuit from 1979 to 1990, the average case consisted of 3.0 petitions for review. See Coglianese, *supra* note 193, at 132-33 (reporting 969 petitions consolidated into 322 cases). In contrast, the challenges to EPA's negotiated rules consisted of an average of 3.7 petitions per case. Only one of the six challenges to EPA's negotiated rules (the disinfectants byproducts rule) consisted of fewer than 3 petitions. See *supra* notes 153-66, 213-46 and accompanying text.

subsequently suggest, in what they reveal about regulatory policymaking as well as about the wisdom of investing further resources in the quest for consensus. I explain why negotiated rulemaking has so far failed to meet proponents' expectations and draw out the implications this study holds for future reliance on formal procedures that depend on the achievement and maintenance of consensus in the regulatory process.

A. *Assessing This Assessment of Negotiated Rulemaking*

To determine whether negotiated rulemaking has had any discernible effect in reducing either rulemaking time or litigation, it has been necessary to compare the results of the negotiated rulemaking process with the likely results if a conventional rulemaking process had been used instead. Of course, we can never know with absolute certainty how long the rules selected for negotiated rulemaking would have taken in the absence of negotiated rulemaking, or whether they would have been litigated. We can only infer what the outcome would have been in the absence of negotiated rulemaking.²⁵³

The best way to infer what would have happened in the absence of negotiated rulemaking is to compare rules selected for negotiated rulemaking with those that were not. Ideally, the comparison group would be comprised of rules that had, on average, the same probability of being challenged in court or the same average time demands. If a sufficiently large number of rules were randomly assigned to negotiated rulemaking and to informal rulemaking, we could ensure that extraneous variables associated with timeliness and litigation would be randomly distributed, leaving the presence or absence of negotiated rulemaking as the only remaining difference.²⁵⁴ Any differences in outcomes could then

253. The need to draw inferences about this counterfactual outcome is inherent in any effort to evaluate the impact of a policy or procedural intervention. See LAWRENCE B. MOHR, *IMPACT ANALYSIS FOR PROGRAM EVALUATION* 3-4 (2d ed. 1995).

254. Even if we could randomly assign rules to negotiated rulemaking, doing so would only allow us to analyze the impact of a different kind of negotiated rulemaking than EPA currently employs—namely a kind where formal negotiation is required or imposed on agency managers. Congress has mandated the use of negotiated rulemaking at the Department of Education and other agencies. See *supra* note 75 and accompanying text. In contrast, EPA's voluntary selection process probably creates some bias in favor of the success of negotiated rulemaking. Rules selected by the agency for formal negotiation presumably have the kind of support that would tend to make negotiated rulemaking

be tested to determine whether they resulted from the use of negotiated rulemaking.²⁵⁵

Of course, agency rules were not randomly selected for negotiated rulemaking. Instead, rules were purposely selected in most cases by the very same agency managers who conducted or oversaw the rulemaking proceedings.²⁵⁶ As with any *ex post* evaluation of a policy intervention, an analysis of the impact of negotiated rulemaking must unavoidably face the possibility of selection bias.²⁵⁷ In other words, the nonrandom assignment of rules to negotiated rulemaking introduces the possibility that the rules chosen for negotiated rulemaking were ones that already had either a greater or lesser need for time, or a greater or lesser propensity to be litigated, at least when compared with the average rule implemented through informal rulemaking.²⁵⁸

more, not less, successful. This source of bias could be minimized if agencies assigned rules randomly to negotiated rulemaking from among a pool of rules nominated by agency staff for the procedure (but no agency has done this). For a discussion of the potential threats to validity associated with voluntary selection, see MOHR, *supra* note 253, at 232-54.

255. With a sample of negotiated rules considerably larger than the 12 EPA rules completed to date, it would be possible to use multivariate statistical techniques to control for other factors that might affect timeliness or litigation.

256. Moreover, not only do the agencies self-select the rules for negotiation, they also control whether to continue a negotiation process once started. As Appendix A shows, a number of agencies have withdrawn either rulemakings or negotiated proceedings even after publishing a notice of intent to use negotiated rulemaking. Searching the *Federal Register*, I found two rules that EPA has promulgated for which it either abandoned or rejected negotiated rulemaking earlier in the rulemaking process. See Fuel and Fuel Additives Registration Regulations, 59 Fed. Reg. 33,042, 33,043 (1994) (rejecting negotiated rulemaking at the outset due to "insufficient support . . . among a number of key parties"); Nitrogen Oxide Emission Reduction Program, 59 Fed. Reg. 13,538 (1994) (abandoning the negotiated rulemaking process and promulgating a final rule pursuant to traditional notice-and-comment procedures). Both of these rules later resulted in the filing of petitions for judicial review. See *Ethyl Corp. v. Browner*, 67 F.3d 941, 946 (D.C. Cir. 1995) (challenging the fuel and fuel additives rule); *Alabama Power Co. v. EPA*, 40 F.3d 450, 451 (D.C. Cir. 1994) (challenging the nitrogen oxides rule). The outcomes in these rulemakings suggest that agencies avoid selecting rules for formal negotiation when they are more likely to be challenged, an issue I discuss explicitly later in this Article. See *infra* notes 253-93 and accompanying text.

257. In this case, selection bias would mean that the sample of negotiated rules was, in some relevant sense, not representative of the sample of conventional rules against which it is compared. See, e.g., KING ET AL., *supra* note 120, at 128-38 (discussing selection bias); MOHR, *supra* note 253, at 163-84 (discussing various types of potential biases in impact analysis).

258. Even if the agency were selecting rules at random (something which would go a long way toward addressing the possibility of selection bias), the fact that such a small number of formally negotiated rules have been promulgated could mean that the average

The ever-present possibility of selection bias in *ex post* evaluations need not paralyze us from drawing reasonable inferences from the available evidence. It is necessary to be mindful of the possibility of selection bias, but it is equally important to consider whether the possibility of such bias affects our ability to draw inferences from the accumulated data. In the case of negotiated rulemaking, there is good reason to believe that any overall selection bias tends in the direction of shorter rulemaking time and less litigation, not the other way around.

To assess the direction of any selection bias, it is helpful to consider other independent variables which are likely to be correlated with rulemaking time and subsequent litigation. One such variable related to both rulemaking time and litigation is the overall significance of a rule as classified by the agency.²⁵⁹ With respect to rulemaking time, Kerwin and Furlong have found that rulemaking takes more time for major and significant rules than for minor rules.²⁶⁰ With respect to litigation, it is generally thought that disputes having a greater impact on parties' interests

outcomes associated with these rules were affected by other variables or by chance rather than by the presence or absence of negotiated rulemaking. While small sample sizes make it difficult to draw inferences with confidence using standard statistical measures, in this case the observed effects (namely, noticeably more litigation rather than less) are so contrary to expectations that it is reasonable to conclude that negotiated rulemaking has not achieved its goals. The limitations of a small sample size would present more of a problem if negotiated rulemaking *did* appear to save time or reduce litigation. For example, when the National Performance Review (NPR) claimed a lower litigation rate for ten of EPA's negotiated rules, *see supra* note 135, the sample size made it extremely difficult to reject the conventional null hypothesis of no impact and conclude that negotiated rulemaking caused the asserted reduction in litigation. As it turns out, the NPR failed to consider that more rules had been challenged. The full record makes it even more reasonable to infer that negotiated rulemaking has not had its intended impact.

259. The terminology used in such classifications has changed somewhat from the Reagan-Bush administrations to the Clinton administration. I treat as "significant" those rules that are published in the semi-annual regulatory agenda. *See, e.g.*, EPA Semiannual Unified Regulatory Agenda, 57 Fed. Reg. 52,024, 52,024 (1992) (excluding "minor, routine, or repetitive actions" from list of regulations and regulatory reviews). I consider as "major" those significant rules which would be considered as major under the standards of Executive Order 12,291, most notably those rules having an annual economic impact of more than \$100 million. *See* Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981) (revoked by Exec. Order No. 12,866, 3 C.F.R. 638 (1994) *reprinted in* 5 U.S.C. § 601 (1994)). Under the Clinton administration, rules that would have previously been labeled "major" are now labeled as "significant." *See* Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted in* 5 U.S.C. § 601 (1994). For ease of reference, I keep with the terminology of Executive Order 12,291 even for rules issued after 1992.

260. *See* Kerwin & Furlong, *supra* note 113, at 124.

are more likely to end up in court.²⁶¹ Empirical research tends to confirm this tendency for disputes over agency regulations.²⁶² As noted in Part II of this Article, the litigation rate for significant EPA rules is higher than that for EPA rules generally.²⁶³ More importantly, the litigation rate for major rules is higher still. As shown in Table 4, the litigation rate for significant RCRA and Clean Air Act rules completed during 1980–1991 was 35 percent; the rate for major RCRA and Clean Air Act rules during a similar period, 1983–1991, was 57 percent.²⁶⁴

Since rulemaking time and the prospects for litigation increase with the overall significance of EPA rules, it is helpful to determine whether the findings reported in Part II derive from a bias in the level of significance of the rules selected for negotiated rulemaking. If rules selected for formal negotiation disproportionately tended to be the major rules issued by an agency, it would be more appropriate to compare these rules with the outcomes for major rules established without negotiated rulemaking.²⁶⁵ Upon examination, though, negotiated rules do not appear to have taken up a disproportionate share of major rules. Out of the thirty-five negotiated rules that federal agencies have promulgated over the past decade and a half, only five have had estimated annual costs in excess of \$100 million.²⁶⁶ In contrast, from 1983 to 1990 federal agencies promulgated an average of 39 major rules each year.²⁶⁷

261. See, e.g., Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LITERATURE 1067 (1989) (discussing the incentives to litigate); Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983) (reviewing literature on disputing behavior).

262. See Coglianese, *supra* note 21, at 742–43 n.3.

263. See *supra* text accompanying notes 199–201.

264. See Coglianese, *supra* note 193, at 95–96. This subset of major rules under these two statutes contained about one-third of all major EPA rules completed during the period. See *id.* at 96 n.42.

265. Even if one made this kind of a comparison for litigation, the 50% litigation rate for EPA's 12 negotiated rules would still not be appreciably lower than the litigation rate for all the major rules under RCRA and the Clean Air Act. See *supra* note 264 and accompanying text.

266. See Asbestos-Containing Materials in Schools, *supra* note 213, at 41,843; Reformulated and Conventional Gasoline Standards, *supra* note 152, at 7810; Transportation for Individuals with Disabilities, 56 Fed. Reg. 45,584, 45,620 (1991) (codified at scattered sections of 49 C.F.R.); HON Rule, *supra* note 226, at 19,411; Vessel Response Plans, 61 Fed. Reg. 1052, 1079 (1996) (codified at 33 C.F.R. pt. 155).

267. See OMB, REGULATORY PROGRAM, *supra* note 97, at 706 (Exhibit 4).

With respect to the EPA, four of its twelve completed negotiated rulemakings were classified as major, even though one of these imposed no net costs on the economy.²⁶⁸ The proportion of EPA negotiated rulemakings considered major (33%) is only modestly higher than the proportion considered major among the significant rules analyzed by Kerwin and Furlong in their study of EPA rulemaking (29%).²⁶⁹ Moreover, it should be evident that the EPA has not relied on negotiated rulemaking to develop most of its major rules. The four major rules subject to negotiated rulemaking amounted to only a small fraction of all the major rules issued by the EPA during the same time period.²⁷⁰ These data confirm that it is reasonable to compare, as I have done in this analysis, the performance of negotiated rules with the performance of significant EPA rules promulgated through conventional notice-and-comment procedures.²⁷¹

268. See Asbestos-Containing Materials in Schools, *supra* note 213, at 41,843-45; Reformulated and Conventional Gasoline Standards, *supra* note 152, at 7810; HON Rule, *supra* note 226, at 19,402. The woodstoves rule was also classified as "major" under Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981) (revoked by Exec. Order No. 12,866, 3 C.F.R. 638 (1994), reprinted in 5 U.S.C. § 601 (1994)), but only because the rule had the potential to increase significantly prices for certain stoves or affect the competitive position of certain firms within the woodstoves market. See New Source Performance Standards for Residential Wood Combustion Units, 53 Fed. Reg. 5860, 5862 (1988) (codified at 40 C.F.R. pt. 60). The EPA determined that any increased costs associated with more efficient woodstoves would "be more than offset by cost savings from the need for less firewood and for fewer chimney cleanings." *Id.*

269. Fifteen of the fifty-one major and significant rules studied by Kerwin and Furlong were major, or 29%. Kerwin & Furlong, *supra* note 113, at 123.

270. EPA promulgated an average of six major rules each year from 1985 to 1990. See OFFICE OF MANAGEMENT AND BUDGET, REGULATORY PROGRAM OF THE UNITED STATES GOVERNMENT, APR. 1, 1986-MAR. 31, 1987, at 555 (Exhibit 2); OFFICE OF MANAGEMENT AND BUDGET, REGULATORY PROGRAM OF THE UNITED STATES GOVERNMENT, APR. 1, 1987-MAR. 31, 1988, at 624 (Exhibit 2); OFFICE OF MANAGEMENT AND BUDGET, REGULATORY PROGRAM OF THE UNITED STATES GOVERNMENT, APR. 1, 1988-MAR. 31, 1989, at 548 (Exhibit 2); OFFICE OF MANAGEMENT AND BUDGET, REGULATORY PROGRAM OF THE UNITED STATES GOVERNMENT, APR. 1, 1990-MAR. 31, 1991, at 627-28 (Exhibits 2 & 2A); OMB, 1992 REGULATORY PROGRAM, *supra* note 97, at 704 (Exhibit 2). Under the Clinton administration, the Office of Management and Budget ceased publication of the annual *Regulatory Program*. If we assume that the EPA continued to promulgate an average of six major rules each year, then the four major negotiated rules amount to only about 5% of all EPA's major rules.

271. The comparison with the entire population of significant rules is more reliable than selecting only a nonrandom sample of these rules. If I selected a sample of informal rules, as Kerwin and Langbein have done in the second phase of their study, I would introduce the possibility of bias in the control group as well as the treatment group. For a brief description of the Kerwin and Langbein study, see *supra* notes 91-92 and accom-

Although the EPA has not negotiated a disproportionate number of major rules, the outcomes of the agency's negotiated rules could still be checked against the outcomes of its major rules. Even then, negotiated rulemaking does not appear to have had any notable effect of decreasing time or litigation. The average time it took the EPA to complete its dozen negotiated rules (1013 days)²⁷² exceeded the average time for major rules issued by three of the four program offices studied by Kerwin and Furlong.²⁷³ Moreover, the average time for the three major negotiated rules issued under the Clean Air Act (1225 days) substantially exceeded the average time for major air rules reported by Kerwin and Furlong.²⁷⁴

A similar pattern holds for litigation rates. Although petitioners challenged somewhat more than half of all major rules under RCRA and the Clean Air Act (57%), they have challenged three out of the four major negotiated rules (75%). When major rules are taken out of the sample of significant rules, the litigation rate for the remaining conventional rules is 30 percent while the litigation rate for the remaining negotiated rules is still higher at 37.5

panying text.

272. For an explanation of how I calculated this average, see *supra* text accompanying notes 118-19.

273. See Kerwin & Furlong, *supra* note 113, at 136 app. B.

274. Kerwin and Furlong report a start-to-finish average of 648 days for the four major air rules in their sample. See *id.* One of these major rules was the woodstoves rule for which EPA used negotiated rulemaking. The average time for the three air reg negs (woodstoves, equipment leaks, and reformulated gasoline) came out to 1225 days—over a year and a half longer. In responding to an earlier version of this Article, Philip Harter argued that the reformulated gasoline rule took an “astonishingly short” amount of time but that the equipment leaks rule took much longer because it was merged into a larger conventional rulemaking. See Harter, *supra* note 119, app. B, at 1425. Yet even if we assume that the equipment leaks rule was finalized on the day when the last notice of an open meeting of the committee was published in the *Federal Register*, July 5, 1990, there is still no measurable time savings for these major rules from negotiated rulemaking. See Open Meeting of the Negotiated Rulemaking Advisory Committee; Fugitive Emissions From Equipment Leaks Rule, 55 Fed. Reg. 27,680 (1990). Even using this patently unrealistic assumption (which creates a heavy bias in favor of finding a time savings) the time for major negotiated air rules is still 763 days, or about 3.5 months *longer* than the average time it took to promulgate the four major air rules included in the Kerwin and Furlong study. See Kerwin & Furlong, *supra* note 113, at 136 app. B. Those significant, but non-major, negotiated rules do fare better compared with the significant conventional rules for three out of the five categories reported by Kerwin and Furlong, see *id.*, but it should be kept in mind that my time data for negotiated rules understate the full rulemaking time measured by Kerwin and Furlong. See *supra* text accompanying note 119.

percent. Although the number of rules in these subsets is small, these data support the conclusion that negotiated rulemaking has not achieved its goal of reducing litigation.

This analysis strongly suggests that selection bias has not set negotiated rules up to fail in terms of time and litigation. If any selection bias does exist in the types of rules selected for negotiated rulemaking, it has undoubtedly tended in the opposite direction—in favor of time savings and litigation avoidance. Although agencies have little reason to use negotiated rulemaking for their most routine rules, in choosing among their significant regulatory actions it appears that agencies have chosen those rules that would have had less of a tendency for time delays or litigation.

There is good reason to believe they have made these choices purposefully. From the seminal work of Philip Harter to the present, the prescriptive literature on negotiated rulemaking repeatedly suggests that negotiated rulemaking only be used under limited circumstances when its success can be most assured.²⁷⁵ In his original article on negotiated rulemaking, Harter highlighted what he called the “conditions that improve the likelihood of success” of negotiated rulemaking and urged agencies to select rules for negotiation with these conditions in mind.²⁷⁶ The Negotiated Rulemaking Act incorporated some of these conditions and now requires agencies to determine if a rule meets the stated conditions for success before convening a negotiated rulemaking.²⁷⁷

One such condition is the presence of only a limited number of affected parties. Harter specifically stated that “negotiation

275. See, e.g., Harter, *supra* note 12, at 42–52 (discussing “conditions that improve the likelihood of successful negotiations”); Perritt, *supra* note 17, at 1642–46 (outlining criteria for selecting appropriate rulemakings for negotiation); Susskind & McMahon, *supra* note 17, at 138–40, 151–57 (examining preconditions for successful negotiated rulemaking); 1995 SOURCEBOOK, *supra* note 30, at 37–40 (listing factors that should be considered before selecting appropriate rules for negotiation).

276. Harter, *supra* note 12, at 42–52.

277. See 5 U.S.C. § 563 (1994) (listing criteria for agencies to consider when determining if there is a need for negotiated rulemaking). As early as 1982, the Administrative Conference recommended that agency conveners should “conduct a preliminary inquiry to determine whether a regulatory negotiating group should be empaneled,” expressly considering factors related to its success and proceeding with the negotiation only if is determined to be “appropriate.” ACUS Recommendation No. 82–4, *supra* note 32, at ¶ 4, reprinted in 1995 SOURCEBOOK, *supra* note 30, at 11, 12. Agencies conducted pre-negotiation screenings of rules even before the practice was essentially required by the Negotiated Rulemaking Act. See 1995 SOURCEBOOK, *supra* note 30, at 40, 45–47; Eisner, *supra* note 17, at 374.

would not work" when "an environmental regulation may apply generally to all industry, and yet affect each industrial sector differently enough so that even several individuals could not represent the interests of all of the sectors."²⁷⁸ The Negotiated Rulemaking Act specifically directs agencies to consider whether the rule affects only "a limited number of identifiable interests,"²⁷⁹ and the EPA recommends formal negotiation only when the parties are "reasonably few in number."²⁸⁰

Not surprisingly, the EPA rules that affect the broadest number of organizations have never been selected for negotiated rulemaking. For example, the EPA did not use negotiated rulemaking to develop its revisions to the National Ambient Air Quality Standards for particulates and ozone.²⁸¹ The agency also avoided negotiated rulemaking for its major programmatic rules under RCRA, including those regulating the land disposal of hazardous wastes²⁸² and establishing criteria for toxicity characteristics.²⁸³ Each of these programmatic rules affected a wide range of interests and seemed more likely from the outset to elicit petitions for judicial review.²⁸⁴ In contrast, EPA's negotiated rules

278. Harter, *supra* note 12, at 46.

279. 5 U.S.C. § 583 (a)(2) (1994); *see also* ACUS Recommendation No. 82-4, *supra* note 32, at ¶ 4c, *reprinted in* 1995 SOURCEBOOK, *supra* note 30, at 11, 12 ("[T]here should be a limited number of interests that will be significantly affected by the rule and therefore represented in the negotiations.").

280. Regulatory Negotiation Project Notice, 48 Fed. Reg. 7494, 7495 (1983).

281. *See* Ozone NAAQS Revisions, 62 Fed. Reg. 38,856 (1997) (codified at 40 C.F.R. pt. 50); Particulate NAAQS Revisions, 62 Fed. Reg. 38,652 (1997) (codified at 40 C.F.R. pt. 50).

282. *See* Land Disposal Restrictions for First Third Scheduled Wastes, 53 Fed. Reg. 31,138 (1988) (codified at 40 C.F.R. pts. 264-266, 268, & 271); Land Disposal Restrictions for Second Third Scheduled Wastes, 54 Fed. Reg. 26,594 (1989) (codified at 40 C.F.R. pts. 148, 264-266, 268, & 271); Land Disposal Restrictions for Third Third Scheduled Wastes, 54 Fed. Reg. 48,372 (1989) (codified at 40 C.F.R. pts. 148, 261, 264, 265, 268, & 271).

283. *See* Toxicity Characteristics Revisions, 55 Fed. Reg. 11,798 (1990) (codified at 40 C.F.R. pts. 261, 264, 268, 271, & 302).

284. *See* American Petroleum Inst. v. EPA, 906 F.2d 729 (D.C. Cir. 1990) (addressing challenges to EPA's first third rule); Chemical Mfrs. Ass'n v. EPA, No. 89-1531 (D.C. Cir. filed Sept. 5, 1989) (challenging the second third scheduled wastes rule); Chemical Waste Management, Inc. v. EPA, 976 F.2d 2 (D.C. Cir. 1992) (addressing challenges to EPA's third third rule); Edison Electric Inst. v. EPA, 2 F.3d 438 (D.C. Cir. 1993) (addressing challenges to EPA's toxicity characteristics rule); American Trucking Ass'ns, Inc. v. EPA, No. 97-1440 (D.C. Cir. filed July 18, 1997) (challenging the particulate NAAQS revisions); American Trucking Ass'ns, Inc. v. EPA, No. 97-1441 (D.C. Cir. filed July 18, 1997) (challenging the ozone NAAQS revisions).

have stood at least a notch below the agency's large programmatic rules in terms of their scope and importance. Each of the negotiated rules has affected only a limited number of parties, at times just a single industry, precisely as the agency's own guidelines suggest.²⁸⁵ Instead of selecting the most challenging rules, the agency has used negotiated rulemaking for what an earlier EPA report called "'second-tier' rules," or those rules "affecting program implementation—rather than rules establishing program structure."²⁸⁶

To the extent that the EPA has accepted other criteria long prescribed for selecting rules for formal negotiation, it has systematically chosen to negotiate rules that are less likely to take a long time and that are less likely to result in litigation. These additional criteria, some of which are codified in the Negotiated Rulemaking Act, include:

- "[a] legislative or judicially imposed deadline or some other mechanism forcing publication of a rule in the near term,"²⁸⁷

285. The Negotiated Rulemaking Act recommends limiting a rulemaking committee to 25 members. See 5 U.S.C. § 565 (1994). Even a committee of this size could not purport to represent all the interests affected by the varied sectors affected by EPA's programmatic rules, such as those mentioned at *supra* notes 281–83 and accompanying text. EPA's negotiated rules have instead targeted specific industries, such as woodstove manufacturers, the chemical industry, petroleum refiners, and automobile manufacturers. See *infra* Appendices A, B, and C. They have also focused on single substances in limited realms, such as asbestos in public schools or disinfectant byproducts in drinking water. See *supra* notes 213, 236 and accompanying text. These rules are by no means routine, but neither are they the agency's most foundational rules that have implications for multiple industrial sectors across the country.

286. U.S. ENVTL. PROTECTION AGENCY, *supra* note 130, at 12, reprinted in 1995 SOURCEBOOK, *supra* note 30, at 34; see also Daniel J. Fiorino, *Regulatory Negotiation as a Policy Process*, 48 PUB. ADMIN. REV. 764, 770 (1988) ("[T]he negotiation process is more reliable and legitimate when it is applied to the resolution of 'how to' rather than 'what' decisions.").

287. Regulatory Negotiation Project Notice, 48 Fed. Reg. 7494, 7495 (1983) (EPA); see also ACUS Recommendation No. 82–4, *supra* note 32, at ¶ 4(a), reprinted in 1995 SOURCEBOOK, *supra* note 30, at 12 (recommending the establishment of a "relatively fixed time frame" within which decisions on a rule should be made); Harter, *supra* note 12, at 47 (suggesting that negotiations work best in a climate of urgency, generated by the inevitability or imminence of a decision); Perritt, *supra* note 17, at 1644 (arguing that effective negotiation requires deadline pressure to force people to make concessions); Susskind & McMahon, *supra* note 17, at 140 (arguing that parties may purposefully delay the settlement of a negotiation without the pressure of a deadline).

- “[a] reasonable likelihood that a committee will reach a consensus on the proposed rule within a fixed period of time;”²⁸⁸
- a determination that “the negotiated rulemaking will not unreasonably delay the notice of proposed rulemaking and the issuance of the final rule;”²⁸⁹
- a finding that “some or all of the parties have common positions on one or more of the issues to be resolved that might serve as a basis for additional agreements;”²⁹⁰
- a willingness by “[t]he participants in the negotiations . . . to negotiate in good faith;”²⁹¹
- a set of regulatory issues for which “no party will have to compromise a fundamental value;”²⁹² and
- a determination that “the parties are likely to participate in negotiations as an alternative to litigation.”²⁹³

Rules satisfying these additional criteria would also seem to fall well within a second-tier of an agency's otherwise significant rules.

Although selection bias is a potential concern in any impact analysis, the data reveal no discernible bias of negotiated rules toward the most significant rules. Moreover, the selection criteria established by EPA show that any remaining bias tends to make it more likely that negotiated rulemaking will succeed. The small fraction of significant and major rules that agencies choose to negotiate are not likely to be the most irresolvable rules. When only about 35 percent of the EPA's most significant rules ordinari-

288. 5 U.S.C. § 563(a)(4) (1994).

289. 5 U.S.C. § 563(a)(5) (1994).

290. Regulatory Negotiation Project Notice, 48 Fed. Reg. at 7495; see also Chris Kirtz, *Regulatory Negotiation: The New Way to Develop Negotiations?*, 1 J. ENVTL. PERMITTING 269, 272 (1992) (stating that parties should have common goals and positions).

291. ACUS Recommendation No. 82-4, *supra* note 32, at ¶ 4(f), reprinted in 1995 SOURCEBOOK, *supra* note 30, at 12.

292. 1995 SOURCEBOOK, *supra* note 30, at 11; see also ACUS Recommendation No. 82-4, *supra* note 32, at ¶ 4b, reprinted in 1995 SOURCEBOOK, *supra* note 29, at 11 (stating that negotiations should not require participants “to compromise their fundamental tenets”); Harter, *supra* note 12, at 49 (“Competing interests cannot negotiate an agreement if the disputed issue concerns fundamental values.”); Perritt, *supra* note 17, at 1645 (stating that negotiated rulemakings should not raise fundamental value conflicts); Susskind & McMahon, *supra* note 17, at 152 (“[P]arties are unlikely to make the necessary concessions to reach consensus if the only way to reach agreement is to compromise fundamental values or beliefs.”).

293. Regulatory Negotiation Project Notice, 48 Fed. Reg. at 7495.

ly end up in court, it is reasonable to conclude that those rules which meet the various conditions for a successful reg neg would probably be more likely at the outset to fall within the 65 percent of rules that do not elicit any litigation. We can also expect that such rules would have a tendency to take less time than other significant rules. That negotiated rulemaking should nevertheless fail to reduce time or litigation is all the more striking given the criteria agencies have articulated for selecting rules for negotiation.

B. *Reevaluating Negotiated Rulemaking*

Why has negotiated rulemaking failed to achieve its principal objectives? At least three reasons can explain why the performance of negotiated rulemaking has failed to surpass the performance of conventional rulemaking. First, negotiated rulemaking actually creates new sources of potential conflict in the regulatory process, even though it is ostensibly designed to reduce conflict. Second, the structure of the regulatory process provides numerous opportunities to disrupt the consensus on which negotiated rulemaking depends. Third, conventional rulemaking has been more effective than previously thought, particularly in avoiding litigation. In this section, I explore these reasons and conclude that negotiated rulemaking, distinguished by its search for consensus, has been an oversold solution to an overstated problem.

At the outset, proponents of negotiated rulemaking might seek to explain negotiated rulemaking's performance differently by trying to shift some of the "blame." They might argue, for example, that in some cases negotiated rulemaking did not cause litigation, but that litigation came about because of unclear or ineffectual statutes.²⁹⁴ They might also argue that delays have not been caused by the negotiations themselves—which have sometimes

294. Some have suggested that the subsequent controversy over the reformulated gasoline rule stemmed not from the negotiated rulemaking process but from problems in the 1990 Clean Air Act Amendments. See Harter, *supra* note 119, app. B, at 1425; Weber, *supra* note 150, at 355–56 n.371. Of course, problems do arise in statutes, thereby giving parties incentives to seek judicial interpretations. Yet even though these problems can occur with negotiated rules, they most certainly also arise with rules adopted through conventional rulemaking. Thus, one cannot seek to exclude such "statutory challenges" from the set of negotiated rules that groups have challenged without also excluding those same kinds of challenges from the set of litigated rules adopted using conventional rulemaking.

been concluded over several months' time—but from delays within the agency after the negotiations have ended.²⁹⁵ Whatever the merits of these claims, such attempts to deflect the responsibility for litigation or time delays away from the negotiated rulemaking process ultimately miss the point. Although there is good reason to think that negotiated rulemaking does create additional conflicts in the administrative process, the underlying issue to which my analysis speaks is not whether negotiated rulemaking *causes* lawsuits or time delays. Rather, the issue is whether it *prevents* them.²⁹⁶ Despite the many hopes for negotiated rulemaking, it has shown itself incapable of preventing the conflict that leads to regulatory delays and petitions for review.

1. *Sources of Conflict Introduced by Negotiated Rulemaking.* In seeking consensus over the substance of regulations, negotiated rulemaking has long been considered a means of reducing conflict in the regulatory process. Yet formal negotiation can actually foster conflict. It adds three new sources of conflict stemming from decisions about membership on negotiated rulemaking committees; the consistency of final rules with negotiated agreements; and the potential for an overall heightened sensitivity to adverse aspects of rules.

The first of these new sources of conflict stems from agency decisions about membership on negotiated rulemaking committees. As discussed above, the criteria for negotiated rulemaking have

295. In a similar vein, proponents of negotiated rulemaking might argue that negotiated rulemaking has failed not because of anything intrinsic to it as an administrative procedure, but rather because of the manner in which agencies have implemented the procedure. Although this argument may have some surface appeal, it demands a clear showing of what exactly administrators could have done differently in these cases, given the many pressures on them from inside and outside government. If negotiated rulemaking's success ultimately hinges on the existence of some Herculean administrator, *reg neg* cannot be considered a realistic means of hastening rulemaking or preventing litigation.

296. If all of negotiated rulemaking's failings can be attributed to other aspects of the regulatory process, that would by no means constitute an endorsement of negotiated rulemaking as a solution to the supposed problems of the regulatory process. On the contrary, that would simply amount to an admission that negotiated rulemaking has not addressed those aspects of the regulatory process that lead, in some cases, to time delays and litigation. Of course, it may well be the case that nothing else could have prevented delays or litigation. As Susan Rose-Ackerman has suggested, in some instances of statutory ambiguity, no form of administrative process will deter parties from seeking a judicial interpretation of a statute. See Rose-Ackerman, *supra* note 19, at 1220. Even though using negotiated rulemaking in such instances might not create the incentives to seek judicial review, neither would it eliminate them.

led agencies to prefer rules that affect a limited range of parties.²⁹⁷ Even with this tendency, agencies have sometimes still not been able to include all the organizations who feel they will be affected by a rule. Although the Negotiated Rulemaking Act insulates the agency from judicial review of its decisions about membership on negotiated rulemaking committees,²⁹⁸ the exclusion of groups from membership on the committees adds a source of discontentment not otherwise present in notice-and-comment rulemaking. The decision to use a select committee whose representatives will develop a draft rule apparently attracts even closer scrutiny by organizations not represented at the negotiating table.

Not surprisingly, the EPA has been criticized by parties who were not invited to participate on the agency's negotiation committees. In the asbestos rule, for example, the negotiations were temporarily disrupted while additional parties sought to participate in the negotiations.²⁹⁹ In the disinfectant byproducts negotiation, the chlorine industry complained that it had been "unfairly excluded" from full participation in the negotiated rulemaking.³⁰⁰ As I have already shown, the reformulated gasoline rule elicited a legal challenge from a tank truck trade association which was not represented on the negotiated rulemaking committee,³⁰¹ as well as trade challenges from two countries not included on the committee.³⁰² The negotiations over the Grand Canyon visibility rule and the wood furniture coatings rule also prompted litigation by groups not participating on the negotiation committee.³⁰³

One organization alone is capable of upsetting a consensus built on unanimity or filing a petition for judicial review. Consequently, even a small number of excluded parties can pose a threat to the effectiveness of negotiated rulemaking. In Kerwin and Langbein's study, twelve percent of the respondents reported that they had to "press" the EPA to let them participate.³⁰⁴

297. See *supra* notes 278-86 and accompanying text.

298. See 5 U.S.C. § 570 (1994).

299. See *Participants and Facilitators Discuss Negotiation of EPA's Proposed Rule on Asbestos in Schools*, *supra* note 216, at 154.

300. *Environmental, Industry Groups Clash on Issues in SDWA Reauthorization Bill*, 27 Env't Rep. (BNA) 266, 267 (May 17, 1996).

301. See *supra* note 161 and accompanying text.

302. See *supra* note 173 and accompanying text.

303. See *supra* notes 149, 233 and accompanying text.

304. See KERWIN & LANGBEIN, *supra* note 89, at 11.

Thirty-five percent of those same respondents reported that at least one affected interest was not represented at the negotiating table, a noteworthy finding considering that it is based on responses by those who *were* represented.³⁰⁵ The likelihood that an agency excludes even one organization from a negotiated rulemaking committee poses an inherent threat to the effectiveness of a procedure that depends on consensus to foreclose litigation.

In addition to conflict over committee membership, negotiated rulemaking adds conflict over the meaning of any consensus and the extent to which an agency's decision reflects that meaning. Sometimes conflicts arise simply between participants over what each thinks a negotiated agreement means. In the disinfectant byproducts rule, for example, a representative from the Natural Resources Defense Council reportedly criticized the American Water Works Association for subsequently urging EPA to set action levels rather than the more stringent maximum contaminant levels NRDC supported in the negotiation.³⁰⁶ AWWA thought its position was consistent with the negotiations because it only agreed to support maximum contaminant levels once the agency could provide adequate microbial data.³⁰⁷

Conflicts can also arise over what was *not* agreed to in the negotiated agreement—what might be termed *expressio unius* disputes. These disputes center on whether a negotiated agreement's silence on an issue reflects an agreement that the agency take no action.³⁰⁸ In the reformulated gasoline case, the American Petroleum Institute charged that EPA's decision to impose second phase nitrogen oxide standards contravened the agreement because the agreement did not address second phase standards.³⁰⁹ The EPA rejected API's administrative petition, concluding that the agreement's silence allowed the agency to proceed without retreating from the consensus.³¹⁰

305. See *id.*

306. See *Water Organization Recommends That EPA Proceed With Rules on Microbials, Byproducts*, *supra* note 245, at 1576.

307. See *id.*

308. Sometimes the silence may simply reflect an oversight, as the issue of compressor issue standards apparently did in the equipment leaks negotiation. See *supra* note 246 and text accompanying notes 226–30.

309. See *supra* note 170 and accompanying text.

310. See *supra* note 172 and accompanying text.

More notably, conflicts arise over the extent to which the agency has adhered to the stated terms of the negotiated agreement. For example, in the reformulated gasoline case, the petroleum industry felt betrayed by the EPA's subsequent decision to issue a separate rule favorable to the ethanol industry.³¹¹ Similarly, in the Department of Education's student loan rulemaking, loan servicers charged that the Department breached commitments it made during the negotiated rulemaking.³¹² More recently, the petroleum industry criticized the Department of Interior's Minerals Management Service when it decided to reopen the comment period over its natural gas royalties rulemaking.³¹³ Without an attempt at negotiated rulemaking, these conflicts over the commitment of the agency to a negotiated agreement could not arise.

The third way negotiated rulemaking can add conflict is by heightening the sensitivity of the parties to adverse portions of a rule. Negotiated agreements raise expectations. When the agency does not follow the negotiated agreement, the existence of the agreement itself stirs up dissatisfaction. For example, consider a conventional rulemaking in which an agency fails to follow the input provided by an affected organization. In that case, the organization has mainly to complain about how adversely the rule affects its interests and how its comments were not accepted. If the agency were to enact the very same rule in contravention of a negotiated agreement, the organization would suffer both the adverse effects of the rule as well as the impression that it had been "sandbagged."³¹⁴ Such a reaction in this latter case would seem even more likely if the organization had compromised on other portions of the rule in order to secure gains on the portion subsequently undercut by the agency. Even if the underlying rule were the same in both cases, we would expect the organization to perceive its interests to be more severely aggrieved in the latter case.³¹⁵ Similarly, we might expect representatives of organiza-

311. See *Renewable Fuels to Make Up 30 Percent of Oxygenates in Reformulated Gas Program*, 25 Env't Rep. (BNA) 462 (July 8, 1994).

312. See *USA Group Loan Servs., Inc. v. Riley*, 82 F.3d 708, 714 (7th Cir. 1996).

313. See Patrick Crow, *Reg-Neg Regrets*, OIL & GAS J., May 27, 1996, at 24.

314. *Id.* at 26 (reporting an oil industry representative's response to the Mineral Management Service's action to reopen the comment period on negotiated rule).

315. Prospect theory suggests that negotiators would ascribe additional negative value to the "loss" of a more preferable outcome they thought they had already secured. See Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under*

tions excluded from a negotiation committee to react more acutely to an adverse portion of a rule if they knew the rule was developed in explicit consultation with other organizations having potentially divergent interests.

In a more general sense, we can expect negotiated rulemaking to heighten conflict simply because of the intensity with which groups scrutinize the rules that are the subject of negotiations. One side benefit often attributed to negotiated rulemaking is that it facilitates learning, both by agency staff and interest group representatives.³¹⁶ The additional time and resources groups devote to discussing rules developed through negotiation provides greater awareness of the issues underlying the rule.³¹⁷ When groups invest these additional resources in negotiation, their representatives presumably also learn more about how aspects of the rule may adversely affect their group interests. Groups may also find that the more time they invest in a rulemaking proceeding, the less willing

Risk, 47 *ECONOMETRICA* 263 (1979). In addition, procedural justice theory would suggest that negotiators would view the fairness of the negotiating procedure at least as importantly as the outcome. See E. ALLEN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988).

316. See, e.g., Fiorino, *supra* note 286, at 768 ("[Negotiated rulemaking is] described as educational, as offering a forum for presenting arguments and evidence, as a way of understanding another side's point of view, and as a chance to generate new ideas and options.")

317. Participation in negotiated rulemaking demands much from all participants, including agencies, industry groups, and citizen groups. See, e.g., U.S. ENVTL. PROTECTION AGENCY, *COSTS OF REGULATORY NEGOTIATIONS TO DATE* (1987), reprinted in 1995 SOURCEBOOK, *supra* note 30, at 273-74 (indicating that the EPA's first seven negotiated rulemakings imposed over \$650,000 in additional costs on the agency); KERWIN & LANGBEIN, *supra* note 89, at 36 (showing that industry groups spent an average of nearly \$700,000 per rulemaking to collect information and participate in formal negotiations); *Regulatory Negotiation: Four Perspectives*, DR FORUM (National Inst. Disp. Resol.), Jan. 1986, reprinted in 1995 SOURCEBOOK, *supra* note 30, at 858 (quoting statement by David Doniger, attorney for the Natural Resources Defense Council, that "regulatory negotiation takes about 10 times as much of our resources as commenting on a rule"); see also Owen Olpin et al., *Applying Alternative Dispute Resolution to Rulemaking*, 1 *ADMIN. L.J.* 575, 579 (1987) (providing a statement by David Doniger that he "put in 30 full days on the woodstove rule . . . and by contrast . . . probably would have put in three days writing comments on the draft rule for traditional rulemaking"). Preliminary results from the second phase of the study by Cornelius Kerwin and Laura Langbein indicated that participants in negotiated rulemakings spent an average of six times as much professional staff time than did participants in the conventional rulemakings included in their study. See Kerwin & Langbein, *supra* note 92, at 24-25. In addition, Kerwin and Langbein have found that "negotiated rulemaking participants were three times as likely (30% vs. 9%) to volunteer that the process required 'too much' time, effort, money, or other resource[s]." *Id.* at 29.

they are to overlook imperfections in the rule. In these ways, the quest for consensus unintentionally contributes new sources of conflict to the regulatory process that can limit negotiated rulemaking's ability to reduce rulemaking time and litigation.

2. *The Fragility of Consensus.* Even if a search for consensus could avoid creating new kinds of conflicts, negotiated rulemaking still would have a difficult time succeeding in many cases for another reason altogether. Any procedure that depends for its success on the maintenance of a consensus is, given the realities of the federal regulatory process, fighting uphill.³¹⁸ A consensus forged at the earliest stages of the rulemaking process is inherently fragile because the structure of the American administrative state provides numerous opportunities for that consensus to unravel.

Even if all the participants in the negotiated rulemaking reach a consensus, the agency must still prepare a preamble to a proposed rule and provide an opportunity for public comment on that proposal.³¹⁹ If the public comment period is to be meaningful, the agency must consider changing the proposed rule in light of any negative comments it receives on a proposal, even if such a change entails a retreat from a consensus.³²⁰ In addition, during the development of the proposed and final rule, the agency receives input from the Office of Management and Budget (and sometimes other executive branch officials) which may lead the agency to modify features of a rule.³²¹ Members of Congress

318. Cf. Rose-Ackerman, *supra* note 19, at 1209 ("A regulatory negotiation is not analogous to a therapy session or a friendly, disinterested discussion of policy options.").

319. The procedures authorized by the Negotiated Rulemaking Act of 1990 only supplement the rulemaking procedures under the Administrative Procedure Act. See 5 U.S.C. § 581 (1994). Some of the added detail the agency gives to the preamble or the rule during the notice-and-comment period may depart from what the parties thought they had agreed to in the negotiation.

320. See, e.g., Crow, *supra* note 313, at 320 (describing how the comment period was reopened in response to criticisms of the Mineral Management Service's negotiated proposal).

321. Both the Bush and Clinton administrations, for example, took close interest in the reformulated gasoline rule, prompting the agency to issue the companion renewable oxygenates requirement which arguably breached the negotiated agreement. See *Ethanol Mandate Raises Question: Can Reg-Neg Process be Trusted?*, AIR & WATER POLLUTION REP. ENV'T WK., July 4, 1994, at 219; see also *EPA's Proposed Renewable Oxygenate Standard: Hearing Before the Senate Comm. on Energy and Natural Resources*, 103d Cong. 29 (1994) (statement of Mary Nichols, Assistant Administrator for Air and Radia-

may step in and attempt to pressure the agency or change the underlying statute in such a way as to disrupt the consensus.³²² As we have seen, other interest groups may also challenge the rule in court, which can lead an agency to change the rule further.³²³ Finally, even if a consensus reached during the early stages of rulemaking could remain intact through all the subsequent stages, the agency can decide at a later time to revise the rule.³²⁴

Theories predicting the success of negotiated rulemaking are based on the assumption that everyone who could ever conceivably take an interest in a rule will come to a complete and stable agreement on every particular aspect of that rule. If that could happen throughout government as well as throughout the interest group community, a rule could theoretically sail undisturbed through the entire rulemaking process. Yet what is theoretically possible is different than what is realistically probable. The intervention by a few well-placed agency managers, or by OMB, the White House, or Congress, can lead to modifications that begin the unravelling of a consensus. It only takes one interest group excluded from the negotiation, or one included but defecting group, to begin unravelling the consensus from outside government.³²⁵ Any heightened sensitivities created by the process of reaching a consensus may serve to accelerate the breakdown of consensus. In practice, the fact that agencies are embedded within a dynamic political environment makes maintaining consensus a bit like building a house of cards.³²⁶

tion, EPA) (stating that President Bush "directed" the EPA to propose a renewable oxygenates program). The involvement of the Bush administration also reportedly led the EPA to abandon the negotiated rulemaking process for its nitrogen oxides rule. See Marianne Lavelle, *EPA Calls Off Sessions on Rules*, NAT'L L.J., July 8, 1991, at 3, 28. As a general rule, courts have recognized intra-executive branch input as a legitimate part of the notice-and-comment rulemaking process. See, e.g., *Sierra Club v. Costle*, 657 F.2d 298, 404-06 (D.C. Cir. 1981).

322. For example, congressional debate over the reauthorization of the Safe Drinking Water Act followed closely behind the conclusion of the disinfectant byproducts negotiated rulemaking, and at least one affected group succeeded in having legislation introduced which would have undermined the negotiation process. See NATIONAL RESEARCH COUNCIL, *supra* note 13, at 187.

323. See *supra* notes 149, 161, 233 and accompanying text.

324. The Department of Education has made subsequent changes to rules that emerged from negotiated rulemaking. See William D. Ford Federal Direct Loan Program, 60 Fed. Reg. 61,790 (1995) (making changes to origination criteria in direct loan regulations); William D. Ford Federal Direct Loan Program, 60 Fed. Reg. 61,820 (1995) (making changes to direct loan program's income contingent repayment plan).

325. See NATIONAL RESEARCH COUNCIL, *supra* note 13, at 187-88.

326. Cf. KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed.

Of course, negotiated rulemaking is not really even like a *house* of cards, but rather like the addition of an extra *room* to a house with an unsteady foundation. Negotiated rulemaking adds an early attempt at consensus-building to a regulatory process designed to make it difficult to sustain interest group bargains. The existing regulatory structure in the United States, with its multiple decisionmakers and avenues of input, surely contributes to rulemaking time and increases the possibility of litigation, at least when compared to imagined alternatives lacking these multiple avenues. This regulatory structure also impedes efforts that depend on consensus by providing multiple steps at which consensus might break down. We could conceive of ways to fix the inherent fragility of consensus, and thereby provide conditions for which negotiated rulemaking could succeed, but such efforts would lead to a vastly different administrative process.³²⁷

From this perspective, it is not surprising that negotiated rulemaking has failed to achieve its principal objectives. Negotiated rulemaking does not change at all the features that make the regulatory process lengthy at times and susceptible to the pursuit of judicial redress. Moreover, these same features, namely the multiple avenues of input, tend to work against the maintenance of consensus, which is the touchstone of negotiated rulemaking. In this sense, negotiated rulemaking raises unrealistic expectations about what can be accomplished in a governmental process characterized by "endless bargaining."³²⁸

In pointing out that the process of rulemaking makes it difficult to sustain a consensus achieved at the early stages of rulemaking, I do not mean to imply that the rulemaking process is necessarily dysfunctional. On the contrary, it can be thought highly desirable to have a process that makes it harder for interest group deals to stick. As Peter Strauss has written, "[t]he embeddedness

1963) (arguing that even simple majoritarian decisionmaking can be unstable).

327. See Funk, *supra* note 21, at 89-97. The agreements of negotiated rulemaking committees could be more easily sustained if these committees, and only these committees, possessed unreviewable lawmaking authority. Yet if such a dramatic change were to be implemented, and no proponent of negotiated rulemaking has suggested that it ought to be, we might just as easily (if not more easily) reduce rulemaking time and litigation by vesting unreviewable lawmaking authority in the agency itself and eliminating the opportunity for public comment and judicial review. I am not proposing that we make these changes, but merely pointing out the limits in the U.S. administrative state of any consensus-based solution to the problems of regulatory delays and litigation.

328. ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 150 (1956).

of the EPA, its focus and its relations with multiple, organizationally superior overseers, gives us practical assurance that it will not run out of control.³²⁹ This same "embeddedness" that helps keep EPA and other regulatory agencies under control also makes it more difficult for these agencies to sustain agreements reached through negotiated rulemaking.

3. *The Success of Conventional Rulemaking.* Although the embeddedness of rulemaking makes it difficult to sustain a formal negotiated agreement, it does not appear to keep agencies from achieving closure on most of their other regulatory decisions. Those features of the regulatory process that make it difficult to sustain an explicit, pre-proposal consensus do not make conflict and litigation inevitable in the usual course of rulemaking. As my findings show, conventional rulemaking works far better in avoiding litigated conflict than has been widely believed. The final reason why negotiated rulemaking has failed to achieve its goals therefore hinges on the comparative success of conventional rulemaking.

Agencies and interest groups seem quite capable of working with each other in the context of conventional rulemaking.³³⁰ If discussions about agency capture, revolving doors, and policy networks over the years have had any truth to them at all, regulators have always kept in touch with affected organizations and their representatives.³³¹ Cornelius Kerwin reports that nearly three quarters of the interest groups he surveyed either regularly, very frequently, or always had informal communications with agency staff before and after the agency proposed a regulation that affected the group.³³² The alternative to negotiated rulemaking is cer-

329. Peter L. Strauss, *Presidential Rulemaking* 25 (Apr. 17, 1997) (unpublished manuscript, on file with author).

330. Cf. Coglianese, *supra* note 21, at 748-51 (discussing the ongoing relationships that develop in the regulatory process).

331. See, e.g., Hugh Heclo, *Issue Networks and the Executive Establishment*, in *THE NEW AMERICAN POLITICAL SYSTEM* 87 (Anthony King ed., 1978); Errol Meidinger, *Regulatory Culture: A Theoretical Outline*, 9 *LAW & POL'Y* 355 (1987); PAUL J. QUIRK, *INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES* (1981); George J. Stigler, *The Theory of Economic Regulation*, 2 *BELL J. ECON. & MGMT. SCI.* 3 (1971).

332. See KERWIN, *supra* note 18, at 202. Scott Furlong found a similar pattern in his study of interest group involvement in the regulatory process. See Scott Furlong, *Interest Group Influence on Regulatory Policy* 126-27 (Dec. 9, 1992) (unpublished Ph.D. dissertation, American University) (on file with author) (reporting that three-fourths of the groups surveyed used informal contact with agency staff as their method of participation).

tainly not, and never has been, an agency that completely locks itself up in a room to settle on a rule. Indeed, the term "conventional" rulemaking is itself a misnomer because agencies use a wide array of procedures short of negotiated rulemaking for involving the public in the rulemaking process.³³³

The failure of negotiated rulemaking—with its quest for consensus—by no means implies a failure of negotiation in the regulatory process. Negotiated rulemaking shows weak results in large part because of the strength of agencies in using less intensive methods of negotiation and public input in the context of conventional rulemaking. These methods, which include individual meetings, public hearings, and ongoing advisory committees, provide agencies with information about technical aspects of regulation as well as the interests of affected parties.

The aggregation of interests has sometimes been considered a primary purpose of administrative law.³³⁴ Negotiated rulemaking has specifically been presented as an optimal means for revealing interests because participants can make tradeoffs on various issues.³³⁵ While formal negotiation does allow for tradeoffs, it by no means guarantees against bluffing and posturing. Since negotiated rulemaking encourages a give-and-take mentality among its participants, representatives on negotiated rulemaking committees have little incentive not to take positions on issues that they might otherwise consider minor in conventional rulemaking. In contrast, conventional rulemaking can provide agencies with clearer information about the intensities of various groups' interests.³³⁶ Conventional rulemaking allows organizations to participate as actively

in agency rulemaking more than 50 percent of the time). The preliminary results from the second phase of the study by Cornelius Kerwin and Laura Langbein further support this pattern. See Kerwin & Langbein, *supra* note 92, at 24 (finding conventional rulemaking "as equally receptive and responsive to public involvement" as negotiated rulemaking).

333. See, e.g., KERWIN, *supra* note 18, at 171–73 (discussing "diversification" in the forms of rulemaking participation); KEYSTONE CENTER, DISCUSSION ON THE USE OF CONSULTATION AND CONSENSUS-BUILDING PROCESSES FOR IMPLEMENTING THE CLEAN AIR ACT OF 1990 3 (1992), reprinted in 1995 SOURCEBOOK, *supra* note 30, at 48, 50 (outlining a "Spectrum of Consultation and Consensus-Building Approaches").

334. See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

335. See, e.g., Harter, *supra* note 21, at 476 (arguing that negotiated rulemaking affords participants an opportunity to rank issues and make tradeoffs).

336. Cf. RICHARD L. HALL, PARTICIPATION IN CONGRESS 3, 7, 237 (1996) (discussing the role of revealed intensities in legislative politics).

or inactively as they like.³³⁷ Their level of participation, taking into account the organization's budgetary constraints, gives the agency additional information about the importance of the rule to the organization, information that can get truncated when an entire rulemaking proceeds by committee.

Negotiated rulemaking has long been regarded as necessary to avoid litigation and conflict.³³⁸ My analysis shows that this is not the case. Litigation is not the inevitable product of agency rulemaking. Many agencies, after all, do not face much conflict between interest groups.³³⁹ Among those agencies that do face conflicting interest groups, public managers appear much more adept than ordinarily assumed at anticipating interests and managing conflict in the normal rulemaking process.³⁴⁰

When conventional rulemaking works better than we thought and negotiated rulemaking fares worse, there seems little reason to continue to pursue negotiated rulemaking. Of course, it may be argued that even if negotiated rulemaking fails to reduce time and litigation, it still allows participants to learn from each other.³⁴¹ It would not be surprising if negotiated rulemaking did foster

337. Since conventional rulemaking is not organized around a series of fixed meetings with the agency, affected groups can decide how much effort to put into drafting comments, contacting agency officials, mobilizing supporters in Congress, and building coalitions.

338. See *supra* notes 26-61 and accompanying text.

339. See James Q. Wilson, *The Politics of Regulation*, in *THE POLITICS OF REGULATION* 357, 365 (James Q. Wilson ed., 1980); JOHN E. CHUBB, *INTEREST GROUPS AND THE BUREAUCRACY: THE POLITICS OF ENERGY* 78 (1983). As a staff member of a financial regulatory agency said to me in a background interview, "We simply don't have any adverse groups. It's just the securities industry . . . and there's usually not much opposition."

340. For example, among the 36 significant hazardous waste rules that EPA issued under the Resource Conservation and Recovery Act from 1988 to 1991, both environmental and industry groups filed comments in only 53 percent. In nearly half the cases, EPA apparently succeeded in avoiding conflict between at least these two kinds of groups.

341. See KERWIN & LANGBEIN, *supra* note 89, at 13 ("Participants generally report that they learned a great deal during the course of a negotiated rulemaking."). Similar, though somewhat more mixed, findings emerged from the second phase of the Kerwin and Langbein study. Compared to participants in conventional rulemakings, participants in negotiated rulemakings were more likely to report that they learned something about scientific and technical issues, the positions of other participants, and how to negotiate. See Kerwin & Langbein, *supra* note 92, at 14, tbl.8. On the other hand, a significantly larger portion of participants in conventional rulemakings than in negotiated rulemakings learned something about the rule, the law, EPA, or "other" issues related to the rulemaking. See *id.*

learning. After all, anyone who participates in a series of intensive sessions focused on a regulation typically will come away having learned more than if he had not attended at all.³⁴² Participants devote a substantial amount of their time and resources to studying the issues.³⁴³ Kerwin and Langbein find that during negotiations organizations spend an average of 26 percent of all their available resources on the negotiations, with environmental groups reporting the highest proportion (50%).³⁴⁴ Kerwin and Langbein also report that "big business" spends an average of \$432,000 for research expenses and over \$250,000 for consultants and lawyers.³⁴⁵ With investments as large as these, we should hope that participants are learning something.

Yet since negotiated rulemaking is characterized by a quest for consensus, we should ask whether learning depends on that quest. In other words, do we need negotiated rulemaking for learning to take place? Or can it be equally well achieved with discussion-oriented sessions that do not seek the achievement of a consensus? To show that learning and information exchange result from a quest for consensus, we would need to compare negotiated rulemaking with other equally intensive agency workshops. Proceedings that negotiation consultants like to call "facilitated joint brainstorming,"³⁴⁶ and which agencies call roundtables, workshops, and "enhanced participatory rulemakings,"³⁴⁷ also aim at

342. Of course, the information participants learn may still not be adequate, unbiased, or equally understood. See Polkinghorn, *supra* note 88, at 29 (citing limitations in the learning potential of negotiated rulemaking).

343. See *supra* note 127 and accompanying text.

344. See KERWIN & LANGBEIN, *supra* note 89, at 36.

345. See *id.*; see also *supra* note 317 and accompanying text (illustrating negotiated rulemaking's demand on the time and financial resources of all participants). These resource commitments should be compared with the cost of challenging a major EPA rule, which typically amounts to \$150,000 to \$250,000 for industry groups. See Coglianese, *supra* note 193, at 112; American Petroleum Inst. v. EPA, 72 F. 3d 907, 910 (D.C. Cir. 1996).

346. See, e.g., Roger Fisher & Landrum Boling, *Facilitated Joint Brainstorming*, CMG UPDATE, Spring 1995, at 3; see also Lawrence Susskind et al., *Farallel Informal Negotiation: A New Kind of International Dialogue*, 12 NEGOTIATION J. 19, 20 (1996).

347. See *The Administrative Dispute Resolution Act of 1995: Hearing Before the Subcomm. on Government Management and the District of Columbia of the Senate Comm. on Governmental Affairs*, 104th Cong. 161 (1996) (enclosure to letter from Shirley Ann Jackson, Chair, Nuclear Regulatory Commission) (noting that the objective of an "enhanced participatory rulemaking" is to provide stakeholders with "an early opportunity to discuss actively the rulemaking issues, as opposed to the objective of attempting to reach a consensus on how those issues should be addressed, as is the case with a negotiated

information exchange and learning, but without the quest for consensus. Such proceedings may well achieve comparable gains in terms of information exchange without generating the same level of position-taking as negotiated rulemaking and without raising unrealistic expectations about what participants will receive from their investment of time.

The quest for consensus has been the hallmark of negotiated rulemaking. In Philip Harter's words, "it is precisely the ability to reach closure on critical issues that separates it from a mere advisory committee or other consultative process."³⁴⁸ Through the difficult task of finding and maintaining a consensus, negotiated rulemaking offers agencies the hope of closure, reduced rulemaking time, and lessened litigation. Yet in the negotiated rulemakings that agencies have thus far completed, closure has been more difficult to sustain than ever anticipated. Despite the many aspirations for negotiated rulemaking, agencies' investment in it has yet to yield any demonstrable dividends in terms of saving time or reducing litigation. The quest for consensus has produced less closure than has the more practiced style of rulemaking on which agencies ordinarily rely.

CONCLUSION

Negotiated rulemaking's promise has been an alluring one. Policymakers and scholars have increasingly looked to negotiated rulemaking to minimize delays and conflict in the regulatory process. In exchange for an up-front investment in the pursuit of consensus early in the rulemaking process, agencies have been promised attractive dividends, namely shortened rulemaking time and reduced litigation over agency rules. Advocates have claimed other benefits from negotiated rulemaking, sometimes seeming to offer the potential for creating nearly flawless regulations if only agencies would affirm decisions reached by interest group representatives. Yet these other purported benefits of negotiated rulemaking—among them better information, shared learning, or heightened feelings of community—have over the years been side attractions to the main event, as they do not depend on a quest for consensus. Policymakers and scholars have focused most of

rulemaking.").

348. Harter, *supra* note 102, at 13.

their attention on negotiated rulemaking's potential to reduce litigation and shorten rulemaking time, benefits that necessarily depend on the successful maintenance of consensus.

Although this quest for consensus has held out the promise of a faster and less conflictual regulatory process, experience has so far shown otherwise. Negotiated rulemaking does not appear any more capable of limiting regulatory time or avoiding litigation than do the rulemaking procedures ordinarily used by agencies. The agency that has used negotiated rulemaking the most, the EPA, has not seen its negotiated rules emerge in final form any sooner than rules not subject to formal negotiation. Once promulgated, negotiated rules still find themselves subject to legal challenge. The litigation rate for negotiated rules issued by the EPA has actually been higher than that for other significant EPA rules. These results will no doubt seem surprising in light of the enthusiastic support negotiated rulemaking has received over the years. They are only all the more surprising considering that agencies have deliberately selected rules for formal negotiation in order to ensure the procedure's success.

On reflection, negotiated rulemaking's weak results should not be as surprising as they may at first seem. While negotiated rulemaking seeks to eliminate conflict, it also adds new sources of conflict and raises unrealistic expectations about what participants can gain from their participation. To meet negotiated rulemaking's instrumental goals, agencies must secure and maintain a consensus, something which is not easy to sustain throughout the entire regulatory process. The multiple avenues of input and oversight in the regulatory process increase the likelihood of policy changes that depart from an early agreement made by a select group of negotiators. Despite these multiple avenues of influence in the regulatory process (or perhaps in part because of them), agencies are ordinarily more effective in crafting rules that avoid litigation without formal negotiation. Agency staff members appear better capable of avoiding litigation when they use the input provided in conventional rulemaking to listen to competing views, balance concerns, and make their best decisions.

The analysis provided in this Article shows that negotiated rulemaking has not lived up to its promising potential to save regulatory time or prevent litigation. From this perspective, it is understandable that agencies have so infrequently relied on negotiated rulemaking and it is inadvisable that Congress and the Pres-

ident would direct agencies to do otherwise. As has long been recognized, negotiated rulemaking demands a considerable investment of time, resources, and energy from all who participate in the process. Such investments might once have been thought sound in light of the benefits promised from a speedier, less contested regulatory process. In the absence of these promised benefits, agencies' continued reliance on public participation methods which do not depend on consensus would appear the more sensible approach to making regulatory decisions.

APPENDIX A:
Abandoned Negotiated Rulemakings

- Surface Mining, Coal Refuse Disposal, 60 Fed. Reg. 13,858 (1995) (Department of Interior).
- Borrower Defense Regulations, 60 Fed. Reg. 11,004 (1995) (Department of Education).
- Electronic Filing of Tariffs, 59 Fed. Reg. 16,164 (1994) (Interstate Commerce Commission).
- Mobile Satellite Service in the Frequency Bands Above 1 GHz, 57 Fed. Reg. 39,661 (1993) (Federal Communications Commission).
- Ex Parte Regulations, 56 Fed. Reg. 65,863 (1991) (Department of Energy).
- Underground Injection Control, Class II Wells, 56 Fed. Reg. 4957 (1991) (Environmental Protection Agency).
- NO_x Emissions Reduction Provisions, 56 Fed. Reg. 21,348 (1991) (Environmental Protection Agency).
- Recycling of Lead Acid Batteries, 55 Fed. Reg. 52,884 (1990) (Environmental Protection Agency).
- Paleontology, Fossil Collection on Federal Lands, 54 Fed. Reg. 48,647 (1989) (Department of Interior).
- Interstate Spread of Varroa Mites, 53 Fed. Reg. 45,134 (1988) (Department of Agriculture).
- Indemnity Agreements with Radiopharmaceutical Licensees, 53 Fed. Reg. 40,233 (1988) (Nuclear Regulatory Commission).
- Informal Dispute Settlement Procedures, 51 Fed. Reg. 5205 (1986) (Federal Trade Commission).
- Air Quality Regulations for Oil and Gas Operations Offshore California, 51 Fed. Reg. 38,472, 38,520 (1986) (Department of Interior).

APPENDIX B:
Pending Negotiated Rulemakings

- Motor Carrier Financial and Operating Data Collection Program, 61 Fed. Reg. 64,849 (1996) (Department of Transportation).
Qualification of Pipeline Personnel, 61 Fed. Reg. 34,410 (1996) (Department of Transportation).
Safety Standards Fire Protection in Shipyard Employment, 61 Fed. Reg. 28,824 (1996) (Department of Labor).
Commercial Driver Physical Qualifications, 61 Fed. Reg. 13,338 (1996) (Department of Transportation).
Accessibility Guidelines for Play Facilities, 60 Fed. Reg. 66,538 (1995) (Architectural & Transportation Barriers Compliance Board).
Mortgage Broker Fee Disclosure Rule, 60 Fed. Reg. 47,650 (1995) (Department of Housing & Urban Development).
Older Workers Benefit Protection Act of 1990, 60 Fed. Reg. 45,388 (1995) (Equal Employment Opportunity Commission).
Lamps, Reflective Devices and Associated Equipment, 60 Fed. Reg. 30,506 (1995) (Department of Transportation).
Marine Mammals, 60 Fed. Reg. 27,049 (1995) (Department of Agriculture).
Cape Cod National Seashore Off-Road Vehicle Use, 60 Fed. Reg. 26,857 (1995) (Department of Interior).
Joint Tribal and Federal Self-Governance, 60 Fed. Reg. 8806 (1995) (Department of Interior).
Indian Gas Valuation, 60 Fed. Reg. 6977 (1995) (Department of Interior).
Revisions of Wage Index for Medicare Reimbursement of Hospice Services, 59 Fed. Reg. 52,129 (1994) (Department of Health & Human Services).
Federal Gas Valuation, 59 Fed. Reg. 28,304 (1994) (Department of Interior).
Local Multipoint Distribution Service and Fixed Satellite Service, 59 Fed. Reg. 7964 (1994) (Federal Communications Commission).
Small Nonroad Engines, 58 Fed. Reg. 33,061 (1993) (Environmental Protection Agency).
Safety Standards for Erection of Steel Structures, 57 Fed. Reg.

61,860 (1992) (Department of Labor).
Hazardous Waste Manifests, 57 Fed. Reg. 24,765 (1992) (Environmental Protection Agency).
Architectural and Industrial Maintenance Coatings, 57 Fed. Reg. 1443 (1992) (Environmental Protection Agency).

APPENDIX C:
Final Negotiated Rulemakings

- Roadway Worker Protection, 61 Fed. Reg. 65,959 (1996) (Department of Transportation).
- Reportable Events, 61 Fed. Reg. 63,988 (1996) (Pension Benefit Guaranty Corporation).
- Hearing Aid Compatible Telephones, 61 Fed. Reg. 42,181 (1996) (Federal Communications Commission).
- Indian Self-Determination, 61 Fed. Reg. 32,482 (1996) (Department of the Interior & Department of Health & Human Services).
- Disinfectant Byproducts in Drinking Water (Information Collection Rule), 61 Fed. Reg. 24,354 (1996) (Environmental Protection Agency).
- Operating Subsidies for Vacant Public Housing Units, 61 Fed. Reg. 7586 (1996) (Department of Housing & Urban Development).
- Oil Spill Vessel Response Plans, 61 Fed. Reg. 1052 (1996) (Department of Transportation).
- Wood Furniture Manufacturing Regulations, 60 Fed. Reg. 62,930 (1995) (Environmental Protection Agency).
- Drawbridge Operations, Chicago River, IL, 60 Fed. Reg. 52,298 (1995) (Department of Transportation).
- Helping Disadvantaged Children Meet High Standards, 60 Fed. Reg. 34,800 (1995) (Department of Education).
- Direct Student Loan Regulations, 59 Fed. Reg. 61,664 (1994) (Department of Education).
- Guaranty Agency Reserves Regulations, 59 Fed. Reg. 60,688 (1994) (Department of Education).
- Higher Education Amendments of 1992, 59 Fed. Reg. 22,348 (1994) (Department of Education).
- National Emission Standards for Hazardous Air Pollutants for Organic Chemicals/Control of Volatile Organic Chemical Equipment Leaks, 59 Fed. Reg. 19,402 (1994) (Environmental Protection Agency).
- Standards for Reformulated and Conventional Gasoline, 59 Fed. Reg. 7716 (1994) (Environmental Protection Agency).
- Provision of Nonvoice Low Earth Orbit Satellite Services, 58 Fed.

- Reg. 68,053 (1993) (Federal Communications Commission).
National Emissions Standards for Coke Oven Batteries, 58 Fed. Reg. 57,898 (1993) (Environmental Protection Agency).
Assessment and Apportionment of Administrative Expenses, 58 Fed. Reg. 10,939 (1993) (Farm Credit Administration).
Scrapie Indemnification, 57 Fed. Reg. 58,130 (1992) (Department of Agriculture).
Worker Protection Standard for Agricultural Pesticides, 57 Fed. Reg. 38,102 (1992) (Environmental Protection Agency).
State Vocational and Applied Technology Education Programs, 57 Fed. Reg. 36,720 (1992) (Department of Education).
Occupational Exposure to 4, 4' Methylenedianiline, 57 Fed. Reg. 35,630 (1992) (Department of Labor).
Transportation for Individuals With Disabilities, 56 Fed. Reg. 45,584 (1991) (Department of Transportation).
Uniform System for Handicapped Parking, 56 Fed. Reg. 10,328 (1991) (Department of Transportation).
Nondiscrimination on the Basis of Handicap in Air Travel, 55 Fed. Reg. 8008 (1990) (Department of Transportation).
Financial Assistance to Meet Special Educational Needs of Children, 54 Fed. Reg. 21,752 (1989) (Department of Education).
Submission and Management of Records and Documents Related to the Licensing of a High-Level Radioactive Waste Depository, 54 Fed. Reg. 14,925 (1989) (Nuclear Regulatory Commission).
Permit Modifications for Hazardous Waste Management Facilities, 53 Fed. Reg. 37,912 (1988) (Environmental Protection Agency).
Underground Injection of Hazardous Wastes, 53 Fed. Reg. 28,118 (1988) (Environmental Protection Agency).
New Source Performance Standards for Residential Wood Heaters, 53 Fed. Reg. 5860 (1988) (Environmental Protection Agency).
Asbestos-Containing Materials in Schools, 52 Fed. Reg. 41,826 (1987) (Environmental Protection Agency).
Occupational Exposure to Benzene, 52 Fed. Reg. 34,460 (1987) (Department of Labor).
Emergency Pesticide Exemptions, 51 Fed. Reg. 1896 (1986) (Environmental Protection Agency).
Nonconformance Penalties for Heavy-Duty Engines and Heavy-Duty Vehicles Under Clean Air Act, 50 Fed. Reg. 35,374 (1985) (Environmental Protection Agency).

Flight Time Limitations and Rest Requirements, 50 Fed. Reg.
29,306 (1985) (Federal Aviation Administration).

APPENDIX D:
Selected References to the Apocryphal
80% Litigation Rate for EPA Rules

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, NEGOTIATED RULEMAKING SOURCEBOOK xv (David M. Pritzker & Deborah S. Dalton eds., 1990) ("All too frequently, government agencies and the public find that agency issuance of a final rule . . . is simply the opening round in the inevitable courtroom litigation to follow [O]ne agency resulted in some 80% of all rules being challenged in court.").

Douglas J. Amy, *Environmental Dispute Resolution: The Promise and the Pitfalls*, in ENVIRONMENTAL POLICY IN THE 1990S 211, 216 (Norman J. Vig & Michael E. Kraft eds., 1990) ("It has been estimated that 80 percent of environmental regulatory decisions are appealed in court, either by industries that believe the rules are too stringent or by environmental groups that believe them to be too lax." (footnote omitted)).

Peter Brimelow & Leslie Spencer, *You Can't Get There From Here*, FORBES, July 6, 1992, at 59 ("[O]f every five major decisions made by [EPA Administrator William K.] Reilly, four are litigated.").

GARY C. BRYNER, BLUE SKIES, GREEN POLITICS: THE CLEAN AIR ACT OF 1990 AND ITS IMPLEMENTATION 211 (1995) ("[V]irtually every major EPA regulation has been challenged in federal courts.").

GARY C. BRYNER, BUREAUCRATIC DISCRETION: LAW AND POLICY IN FEDERAL REGULATORY AGENCIES 117 (1987) ("Former administrator William Ruckelshaus estimated that 80 percent of all rules issued by the EPA were subsequently challenged in federal courts").

CARNEGIE COMM'N ON SCIENCE, TECH., & GOV'T, RISK AND THE ENVIRONMENT: IMPROVING REGULATORY DECISION MAKING 109 (1993) ("In some agencies, 80 percent of major rules are appealed.").

Don R. Clay, *New Environmentalism: A Cooperative Strategy*, F. FOR APPLIED RES. & PUB. POL., Spring 1993, at 125, 126 ("Currently, four out of five EPA decisions are challenged in

court. Consensus-building should reduce the number of cases that go to court.”).

COUNCIL ON ENVTL. QUALITY, ENVIRONMENTAL QUALITY: THE SIXTEENTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 3 (1985) (“Fully 85 percent of EPA’s regulations result in litigation.”).

Cynthia Croce, *Negotiation Instead of Confrontation*, EPA J., Apr. 1985, at 23, 23 (“80 percent of the time, EPA’s final rules are challenged in court!”).

J. Patrick Dobel, *Managerial Leadership in Divided Times: William Ruckelshaus and the Paradoxes of Independence*, 26 ADMIN. & SOC’Y 488, 492 (1995) (“More than 80% of all environmental regulations end up in court.” (citation omitted)).

John P. Dwyer, *Contentiousness and Cooperation in Environmental Regulation*, 35 AM. J. COMP. L. 809, 809 n.1, 819 (1987) (“80% of EPA’s regulations are challenged in court [and] most parties . . . challenge virtually every regulation in order to preserve their rights.”).

Daniel J. Fiorino & Chris Kirtz, *Breaking Down Walls: Negotiated Rulemaking at EPA*, 4 TEMP. ENVTL. L. & TECH. J. 29, 29 (1985) (“As many as 80% of EPA’s final rules are challenged . . . often by both sides of an issue.”).

DANIEL J. FIORINO, MAKING ENVIRONMENTAL POLICY 56 (1995) (“A near certainty for most important final rules is a court challenge.”).

Robert Glicksman & Christopher H. Schroeder, *EPA and the Courts: Twenty Years of Law and Politics*, LAW & CONTEMP. PROBS., Autumn 1991, at 249, 249 n.2 (“[O]ver 80% of EPA’s regulations are challenged in court.”).

WILLIAM GREIDER, WHO WILL TELL THE PEOPLE: THE BETRAYAL OF AMERICAN DEMOCRACY 110 (1992) (“[Ruckelshaus] asked the [EPA] general counsel to study it and he found that 85 percent of the decisions made by the EPA administrator that are appealable were appealed.”).

MICHAEL GREVE, THE DEMISE OF ENVIRONMENTALISM IN AMERICAN LAW 92 (1996) (“At any given time, some 80 percent of the EPA’s rulemaking proceedings are tied up in litigation.”).

KATHRYN HARRISON & GEORGE HOBERG, RISK, SCIENCE & POLITICS 13 (1994) (“80 percent of the Environmental Protection Agency’s regulations have ended up in court.”).

- GEORGE HOBERG, *PLURALISM BY DESIGN: ENVIRONMENTAL POLICY AND THE AMERICAN REGULATORY STATE* 199 (1992) ("By one count, fully 80% of EPA's final decisions are the subject of judicial appeal." (citation omitted)).
- PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* 87 (1994) ("[M]ost decisions are appealed in the courts, including 80 percent of the EPA's decisions . . .").
- Robert A. Kagan, *Adversarial Legalism and American Government*, 10 J. POL'Y ANALYSIS & MGMT. 369, 371 (1991) ("An administrator of the U.S. Environmental Protection Agency estimated that more than 80 percent of EPA's regulations have been challenged in court.").
- CORNELIUS M. KERWIN, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY* 264 (1994) ("85 percent of the hundreds of nonroutine rules issued by the EPA each year are challenged in court.").
- Chris Kirtz, *Environmental Protection Agency's Regulatory Negotiation Project*, NAT'L INST. OF JUST. REP., May 1985, at 9, 9 ("As many as 80 percent of the U.S. Environmental Protection Agency's regulations are challenged in court.").
- Chris Kirtz, *Regulatory Negotiation: The New Way to Develop Regulations?*, 1 J. ENVTL. PERMITTING 269, 269 (1992) ("Almost before the ink was dry—in over 80 percent of our 'major' regulations—we were sued.").
- Marianne Lavelle, *'Reg-Neg' Revving Up in D.C.*, NAT'L L.J., Mar. 21, 1988, at 1, 21 ("Of the 200 to 300 final rules the agency publishes each year, about 80 percent are challenged in court.").
- Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, LAW & CONTEMP. PROBS., Autumn 1991, at 311, 324 (stating that EPA "has had 80 to 85 percent of its major regulations challenged in court.").
- Laurie McGinley, *Experimental "Reg-Negs" Try to Head Off Numerous Attacks on Federal Regulations*, WALL ST. J., Nov. 5, 1987, at 39 ("80% of the 75 EPA rules developed each year by standard methods are challenged in court.").
- Gerard McMahon, *Regulatory Negotiation: A Response to the Crisis of Regulatory Legitimacy* 2 (Nov. 1985) (Harvard Law School Program on Negotiation Working Paper No. 8, on file with author) ("[O]ver 80% of EPA's rules are challenged in court.").

William H. Miller, *Bypassing the Lawyers: "Regulatory Negotiation" Gets Test in Agencies*, INDUSTRY WEEK, June 23, 1986, at 20, 20 (quoting former EPA Administrator Lee Thomas that "[f]ully 80% of the rules EPA issues are challenged.").

NATIONAL ENVTL. POL'Y INST., REINVENTING THE VEHICLE FOR ENVIRONMENTAL MANAGEMENT: FIRST PHASE REPORT 34 (1995) ("It has been estimated that the [Environmental Protection] Agency is sued on 80% of its regulations.").

OFFICE OF TECHNOLOGY ASSESSMENT, 103D CONG., INDUSTRY, TECHNOLOGY, AND THE ENVIRONMENT: COMPETITIVE CHALLENGES AND BUSINESS OPPORTUNITIES, OTA-ITE-586, at 266 (1994) ("Currently, four out of five EPA decisions are said to be challenged in court, suggesting the difficulties of achieving consensus.").

OFFICE OF THE VICE PRESIDENT, ACCOMPANYING REPORT OF THE NATIONAL PERFORMANCE REVIEW: IMPROVING REGULATORY SYSTEMS 32 n.7 (1993) ("[F]ormer EPA administrator William Ruckelshaus estimated that more than 80 percent of EPA's major rules were challenged in court.").

ROSEMARY O'LEARY, ENVIRONMENTAL CHANGE: FEDERAL COURTS AND THE EPA 17 (1993) ("EPA Administrator William K. Reilly once estimated that 80 percent of his decisions were appealed to the courts.").

Robert V. Percival, *The Bounds of Consent: Consent Decrees, Settlements, and Federal Environmental Policy Making*, 1987 U. CHI. LEGAL F. 327, 330 n.10 ("EPA has estimated that as many as 80% of its regulations have been challenged in court.").

Michael E. Porter & Claas van der Linde, *Toward a New Conception of the Environment-Competitiveness Relationship*, 9 J. ECON. PERSP. 97, 115 (1995) ("It has been reported that four out of five EPA decisions are currently challenged in court.").

David M. Pritzker, *Working Together for Better Regulations*, 5 NAT. RESOURCES & ENV'T 29, 30 (1990) ("EPA has been reporting for years that over 80 percent of its promulgated rules are challenged in court.").

Walter A. Rosenbaum, *The Clenched Fist and the Open Hand: Into the 1990s at EPA*, in ENVIRONMENTAL POLICY IN THE 1990s 121, 122 (Norman J. Vig & Michael E. Kraft eds., 2d ed. 1994) ("More than 80 percent of EPA's major regulatory decisions were challenged in the courts by environmental

organizations or industry during the 1970s, and such challenges, while decreasing, continued through the 1980s to impede the agency's rule making.").

WALTER A. ROSENBAUM, *ENVIRONMENTAL POLITICS AND POLICY* 15 (3d ed. 1995) ("litigation [is] almost predestined for any major regulation").

William D. Ruckelshaus, *Environmental Protection: A Brief History of the Environmental Movement in America and the Implications Abroad*, 15 ENVTL. L. 455, 463 (1984-85) ("Eighty percent of what the agency does is finally decided either in a negotiated or formal court decision.").

William D. Ruckelshaus, *Environmental Risks and Liabilities—Identification, Assessment, and Management*, 24 HOUS. L. REV. 11, 19 (1987) ("[E]ighty percent [of EPA's] decisions, rules, regulations, and judgments" end up in court).

William D. Ruckelshaus, *Stopping the Pendulum*, ENVTL. F., Nov.-Dec. 1995, at 25, 27 ("As is well known, nearly every major EPA decision ends up in the judicial system.").

Mark E. Rushefsky, *Reducing Risk Conflict by Regulatory Negotiation: A Preliminary Evaluation*, in SYSTEMATIC ANALYSIS IN DISPUTE RESOLUTION, 109, 111 (Stuart S. Nagel & Miriam K. Mills eds., 1991) ("[O]ne estimate is that 80 percent of EPA's rules have been challenged").

Clare M. Ryan, *Regulatory Negotiation: Learning from Experiences at the U.S. Environmental Protection Agency*, in MEDIATING ENVIRONMENTAL CONFLICTS: THEORY AND PRACTICE 203, 209 (J. Walton Blackburn & Willa Marie Bruce eds., 1995) ("At any one time, EPA may be in the process of developing from 200 to 250 rules, nearly 80 percent of which are challenged in court.").

KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 367 (1986) ("Virtually every regulation issued by such agencies as the Environmental Protection Agency and the Occupational Safety and Health Administration is challenged in court either by environmental or consumer groups or by industry.").

Keith Schneider, *Who's Making the Rules?*, N.Y. TIMES, Feb. 8, 1986, at A7 (quoting Chris Kirtz, director of the EPA's Regulatory Negotiation Project, that "[e]ighty percent of our final regulations are litigated.").

Peter Schneider & Ellen Tohn, *Success in Negotiating Environmen-*

- tal Regulations*, 9 ENVTL. IMPACT ASSESSMENT REV. 67, 68 (1985) ("Former US EPA Administrator William D. Ruckelshaus . . . noted that 'about 80 percent of all the rules that EPA issues are challenged in court.'").
- Philip Shabecoff, *EPA Drifts in Stalemate*, N.Y. TIMES, Nov. 23, 1984, at A23 ("[T]he environmental agency's Administrator, William D. Ruckelshaus, recently noted that 80 percent of all rules issued by his agency were now challenged in court . . .").
- Rochelle L. Stanfield, *Resolving Disputes*, 18 NAT'L J. 2764, 2764 (1986) ("A whopping 80 percent of the 300 regulations issued each year by the EPA end up in court.").
- LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES 3-4 (1987) ("Four out of every five times the Environmental Protection Agency (EPA) issues new regulations, its lawyers wind up in court fending off industry's claims that the agency is being too tough on them, or fighting environmentalists' charges that it is not being tough enough.").
- Lawrence Susskind & Gerard McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 YALE J. ON REG. 133, 134 (1985) ("[F]ormer Administrator William Ruckelshaus estimated that more than 80% of EPA's rules are challenged in court.").
- Lawrence Susskind & Laura Van Dam, *Squaring Off at the Table, Not in the Courts*, 89 TECH. REV. 36, 37 (1986) ("[A]bout four of every five rules that EPA promulgates are challenged in court.").
- U.S. Env'tl. Protection Agency, *Negotiated Rulemaking at the Environmental Protection Agency* 1 (1994) ("About 80 percent of EPA's final rules are challenged in court.").
- Patricia M. Wald, *Regulation at Risk: Are Courts Part of the Solution or Most of the Problem*, 67 S. CAL. L. REV. 621, 624 (1994) ("Eighty percent of all major Environmental Protection Agency ('EPA') rules are litigated in court.").
- Edward P. Weber, *Pluralism by the Rules: The Emergence of Collaborative Games in National Pollution Control Politics* 51 (Jan. 15, 1997) (unpublished manuscript, on file with author) ("[F]our out of every five major rules promulgated by EPA are contested in court . . .").
- Edward P. Weber & Anne M. Khademian, *From Agitation to*

Collaboration: Clearing the Air Through Negotiation, 57 PUB. ADMIN. REV. 396, 396 (1997) ("Not surprisingly, it is estimated that 80 percent of all major rules issued by the EPA are litigated in lengthy court battles that are the stuff of legend in environmental politics.").

JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 284 (1989) ("Over 80 percent of the three hundred or so regulations EPA issues each year wind up in the courts.").

JULIA M. WONDOLLECK, PUBLIC LANDS CONFLICT AND RESOLUTION: MANAGING NATIONAL FOREST DISPUTES 226 (1988) ("The EPA discovered that, of the 300 regulations that the agency was issuing each year, 80% were ending up in court and 30% of those were being significantly changed as a result of the legal challenge.").

